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UNITED STATES CUSTOMS COURT REPORTS

VOLUME 81

CASES ADJUDGED IN THE
UNITED STATES CUSTOMS COURT

July–December 1978

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UNITED STATES CUSTOMS COURT

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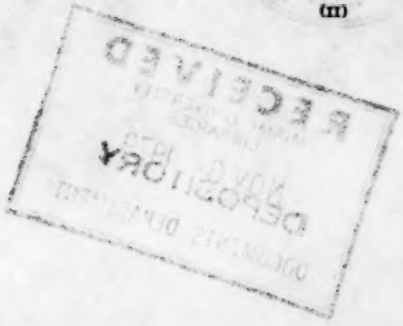

CONTENTS

	Page
Cases reported	V
Cases reported in Federal Supplement	VII
Decisions:	
Customs	1
Rules	145
Abstracted decisions:	
Protest	185
Reappraisement	203
Index-digest	225

CASES REPORTED

Classification

	Page
Aluminum Housewares Co., Inc., C.D. 4760	24
Barth, Wolf D., Co., Inc., C.D. 4778	127
Beacon Cycle & Supply Co., Inc., C.D. 4764	46
Bernard, J. E., Co., C.D. 4766	60
Border Brokerage Company, Inc., C.D. 4756	5
Chevron Oil Company and Exxon Corporation (Successor to Humble Oil & Refining Company), C.D. 4772	87
Daisy-Heddon, Div. Victor Comptometer Corp., C.D. 4765	55
Dolliff & Company, Inc., C.D. 4755	1
Exxon Corporation (Successor to Humble Oil & Refining Company) and Chevron Oil Company, C.D. 4772	87
Hambro Automotive Corporation, C.D. 4761	29
Hawaiian Independent Refinery, C.D. 4777	117
Hismoco (American) Co., C.D. 4762	32
Indian Head, Inc., C.D. 4758	14
International Seaway Trading Corp., C.D. 4773	92
Mitsubishi International Corporation, C.D. 4771	86
Pistorino & Co., Inc., C.D.'s 4763, 4779	37, 131
Pistorino & Company, Inc., C.D. 4774	106
Rosenthal, H., Co., C.D. 4769	77
Roussel Corp., C.D. 4776	115
Sanyo Electric, Inc., C.D. 4775	114
Wild Heerbrugg Instruments, Inc., C.D.'s 4767, 4781	66, 141

Valuation

Atkins Kroll & Co., Inc., C.D. 4780	138
Cascade Corp., C.D. 4757	9
Ladwig, Harold Elton, C.D. 4768	71
Reisman, H., Corp., C.D. 4759	22
Sass, Dr. Earl, C.D. 4770	80

Rules

Page

Armstrong Bros. Tool Co. et al. (American manufacturers); Great Neck Saw Manufacturing, Incorporated, party in interest, C.R.D. 78–14 162
Brother International Corporation, party in interest; SCM Corporation (American manufacturer), C.R.D. 78–13 159
Capar Components Corp., party in interest; Sprague Electric Company (American manufacturer), C.R.D. 78–18 168
G. M. Rubber Industries, Inc., C.R.D. 78–15 162
Great Neck Saw Manufacturing, Incorporated, party in interest; Armstrong Bros. Tool Co. et al. (American manufacturers), C.R.D. 78–14 162
Lauffer, H. E., Co., Inc. C.R.D. 78–16 165
Michelin Tire Corporation, C.R.D.'s 78–10, 78–12 ..... 151, 157
Mitsubishi International Corporation, C.R.D. 78–9 145
Reliable Chemical Company, C.R.D. 78–11 154
SCM Corporation (American manufacturer); Brother International Corporation, party in interest, C.R.D. 78–13 159
Sprague Electric Company (American manufacturer); Capar Components Corp., party in interest, C.R.D. 78–18 168
Strauss, F. J., Co., Inc., C.R.D. 78–17 166

CASES REPORTED IN FEDERAL SUPPLEMENT

Air-Sea Brokers, Inc. *v.* United States, 80 Cust, Ct. 102, C.D. 4742; 454 F. Supp. 451

Armstrong Bros. Tool Co. et al. *v.* United States (Great Neck Saw Manufacturing, Incorporated, Party-in-Interest), 80 Cust. Ct. 160, C.D. 4751; 453 F. Supp. 889

Beacon Cycle & Supply Co., Inc. *v.* United States, 81 Cust. Ct. 46, C.D. 4764; 458 F. Supp. 813

Border Brokerage Company, Inc. *v.* United States, 81 Cust. Ct. 5, C.D. 4756; 457 F. Supp. 1020

Cascade Corp. *v.* United States, 81 Cust. Ct. 9, C.D. 4757; 457 F. Supp. 1022

Daisy-Heddon, Div. Victor Comptometer Corp. *v.* United States, 81 Cust. Ct. 55, C.D. 4765; 460 F. Supp. 680

Dolliff & Company, Inc. *v.* United States, 81 Cust. Ct. 1, C.D. 4755; 455 F. Supp. 618

Hambro Automotive Corporation *v.* United States, 81 Cust. Ct. 29, C.D. 4761; 458 F. Supp. 1220

Hawaiian Independent Refinery *v.* United States, 81 Cust. Ct. 117, C.D. 4777; 460 F. Supp. 1249

Indian Head, Inc. *v.* United States, 81 Cust. Ct. 14, C.D. 4758; 458 F. Supp. 807

Ladwig, Harold Elton *v.* United States, 81 Cust. Ct. 71, C.D. 4768; 460 F. Supp. 683

Lowenstein, Ernest, Inc., United States *v.*, 80 Cust. Ct. 211, A.R.D. 325; 451 F. Supp. 988

Michelin Tire Corporation *v.* United States, 81 Cust Ct. 151, C.R.D. 78–10; 453 F. Supp. 897

Mitsubishi International Corporation *v.* United States, 81 Cust. Ct. 145, C.R.D. 78–9; 454 F. Supp. 458

Penney, J. C., Purchasing Corporation et al. *v.* United States, 80 Cust. Ct. 84, C.D. 4741; 451 F. Supp. 973

Pistorino & Co., Inc. *v.* United States, 81 Cust. Ct. 37, C.D. 4763; 461 F. Supp. 331

Pistorino & Company, Inc. *v.* United States, 81 Cust. Ct. 106, C.D. 4774; 461 F. Supp. 337

Reisman, H., Corp. *v.* United States, 81 Cust. Ct. 22, C.D. 4759; 458 F. Supp. 218

Rosenthal, H., Co. *v.* United States, 81 Cust. Ct. 77, C.D. 4769; 460 F. Supp. 1246

Sortex Company of North America, Inc. *v.* United States, 80 Cust. Ct. 134, C.D. 4746; 453 F. Supp. 644

Stinnes, Hugo, Steel and Metals Co. *v.* United States, 80 Cust. Ct. 175, C.D. 4753; 453 F. Supp. 94

DECISIONS OF THE UNITED STATES CUSTOMS COURT

Customs

(C.D. 4755)

DOLLIFF & COMPANY, INC. *v.* UNITED STATES

American goods returned

GREIGE GOODS—IMPROVEMENT IN CONDITION—NEW ARTICLE

Dacron polyester fabric exported from the United States to Canada as *greige goods* and there dyed and subjected to other processing and then imported into the United States in 1970 and 1971 as *finished fabric, held,* dutiable as liquidated under TSUS item 338.30 as woven fabrics, of man-made fibers, other, at various rates of duty, and not as claimed under TSUS item 806.20 as articles exported for repairs or alterations, where the evidence establishes that the processing in Canada created a new article differing in name, value, appearance, size, shape, and use from the article exported to Canada. *A. F. Burstrom* v. *United States,* 44 CCPA 27, C.A.D. 631 (1956) cited.

Court No. 73-5-01217

Port of Boston

[Dismissed.]

(Decided July 7, 1978)

Doherty and Melahn (*William E. Melahn* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Laura D. Millman,* trial attorney), for the defendant.

RICHARDSON, Judge: The merchandise in this case consists of dacron polyester fabric which was exported from Canada in 1970 and 1971 and classified in liquidation upon entry at New Bedford, Massachusetts under TSUS item 338.30, as modified by T.D. 68-9, as woven fabrics, of man-made fibers, other, at various rates of duty which were assessed upon the full value of the merchandise. It is claimed by the plaintiff-importer that the merchandise should be

classified under TSUS item 806.20 as articles exported for repairs or alterations, with duty assessed only upon the value of the processing outside the United States, in this case, Canada. The issue in the case is whether the processing of the fabric in Canada constituted a mere "alteration," or resulted in "the creation of a new and different article."

The essential facts concerning the processing operation in Canada are not in dispute. The domestic loom product is exported as *greige goods* in rolls of approximately 800 to 1,000 yards in length and approximately 118 to 119½ inches in width. It is returned as *finished fabric* suitable for manufacture into curtains, folded over double, widthwise, and cut in lengths of approximately 60 to 80 yards. In Canada the greige goods are subjected to a number of operations, consisting of heat-setting, chemical-scouring, dyeing[1] and heat-setting a second time during which finishing chemicals consisting of melamine resin for anticreasing characteristics, an antistatic chemical, and a softener chemical are applied to the fabric in this final stage. The initial heat-setting treatment serves to stabilize the fabric through the elimination of shrinkage.[2] Scouring removes sizing and impurities from the fabric. And the second heat-setting treatment induces a permanent adherence of the finishing chemicals to the fabric during the drying stage of the processing. The finished fabric is then inspected, folded and shipped back to the United States.

Although the foreign processing to which the greige goods in this case were subjected, and which was viewed by the court and counsel, was designed to prepare these goods for manufacture into curtains, it was brought out that a modification of the finishing operations could be made which would render the finished fabric suitable for use in apparel industries in the manufacture of undergarments and blouses. In comparing the greige goods with the finished fabric in this case, Roger Normandin, plant manager for Consolidated Textiles, Ltd. of Drummondville, Quebec, Canada, the foreign finisher in this case, testified on recross-examination (R. 162):

> Q. Do you see any difference in quality as far as use in the home between the finished goods and the greige goods?—A. Well, the finished goods are more attractive.
>
> Q. Are they more attractive? Are they useful? Do they wrinkle as easily as the greige?—A. I would say that the performance of the finished goods, in certain respects, is slightly better or, like for the creasing, it is going to perform better. I would say, yes, but with reservation.
>
> Q. And what about the hand, is the greige as soft as the finished good?—A. The finished good is softer.

[1] Only the colored fabrics are dyed; the white fabrics receive a double scouring in lieu of dyeing.

[2] The greige goods have a shrinkage rate of 3 to 4 percent as compared to a shrinkage rate of less than 1 percent for the finished fabric.

Q. What about the ability to resist static and dirt, is the greige as good as the finished goods in that respect?—A. No.

Q. What about the ability to be draped, the drapability of each, is the greige one that would hang as well as the finished?—A. Probably not, no.

And on the matter of usage of the greige goods *vis-à-vis* the finished fabric, Kenneth V. Chace, president of Berkshire Hathaway, Inc. of New Bedford, Massachusetts, the manufacturer of the greige goods herein, testified on recross-examination (R. 111–12):

Q. When you sold the greige goods, at the time you sold them, to whom did you sell them?—A. We would sell the greige goods to a converter.

Q. Would he turn them into curtains without finishing?—A. No, no.

Q. When you sell the finished goods, to whom do you sell them?—A. To a decorator-jobber.

Q. And would he, consequently, either hire out or cut them into curtains?—A. His customer would.

Q. So that the use of the greige goods, by the buyer of the greige goods, and the use of the finished goods by the buyer of the finished goods, is different?—A. Yes.

Earlier, the witness testified on cross-examination that the price at which his company sold the greige goods to converters was less than the $1.50 to $1.60 a yard price at which it sold the finished fabric to jobbers (R. 83–85).

Plaintiff argues that the changes made in the greige goods as a result of the finishing operations performed on them did not change the *classification* of the goods as woven fabrics of man-made fiber, and as such, the changes were within the ambit of the term "alterations" as provided for in item 806.20, that the Canadian processing did not change the *use* of this product, and that the finished goods are not a *new* and *significantly different* article from the greige goods. The Government argues that the foreign processing created a new article of commerce and did not result in a mere "alteration" of the old article.

The court is of the opinion that the imported finished fabric is not the same article as the greige goods exported to Canada.

The merchandise exported to Canada is known in the trade as greige goods, while the imported product is known as finished fabric. The greige goods are cheaper than the finished fabric. Samples of the greige goods and finished fabric before the court readily disclose that the former are somewhat coarse to the touch while the latter are soft to the touch. The greige is exported in *rolls* of from 800- to 1,000-yard lengths while the finished fabric is imported in *folds* of from 60- to 80-yard lengths in which form they are apparently offered to the cutting-up trades. In Canada the heat settings cause the filament

fibers of the greige to become fuller, i.e., to blossom, with the result that they are physically different after such treatment than before.

And finally, the greige and finished fabrics are offered for sale and sold in different markets to different classes of buyers, with the former being sold either to converters who finish them, or in the greige goods commodities market, while the latter are sold to decorator-jobbers who cause them to be made up into curtains. And such divergence of marketing practices here is underscored by the evidence in the record which reveals that the respective classes of buyers are concerned with entirely different characteristics. Hence, where converters and purchasers in the commodities market are concerned with technical information such as the number of picks and ends, denier, construction, and the warp and filling yarns of the greige goods, the decorator-jobbers are concerned with color and performance qualities of the finished fabrics such as light-fastness, hand, stiffness, tear strength, crease resistance, and shrinkage resistance.

In sum, greige goods and finished fabric of polyester fiber are shown to differ in name, value, appearance, size, shape, and use. Such product differences between steel *slabs* processed in Canada and steel *ingots* exported from the United States, led our appellate court in *A. F. Burstrom* v. *United States*, 44 CCPA 27, C.A.D. 631 (1956) to reject the contention advanced by the importer in that case that the slabs had been merely "altered" from the ingots, within the meaning of paragraph 1516(g) of the Tariff Act of 1930, as amended, the court concluding that the two products were not the *same articles*. Our appellate court said there (p. 30) "Clearly the conversion of ingots into slabs does convert them into something else."

In *C. J. Tower & Sons of Niagara, Inc.* v. *United States*, 45 Cust. Ct. 111, C.D. 2208 (1960), involving merchandise more closely identified with that at bar, finished cloth backing, processed in Canada by the stretching, dyeing, and sizing of cotton drills known as greige goods, was held by the Customs Court to be a new article rather than an alteration of the greige goods within the purview of paragraph 1615(g) as claimed. There the court differentiated between the two products in terms of color, width, length, porosity, in the distribution of the threads in the weave, in weight, tensile strength, texture, and suppleness. Citing the *Burstrom* case, the court also said (p. 115):

> . . . The exported merchandise is known in the trade as greige or grey goods, while the imported merchandise is finished cloth backing and is ready to be coated or the abrasive applied, in order to produce a coated abrasive. Although Mr. Bratton testified that the cloth was designed specially for the purpose intended, it is evident from an examination of the samples that the grey goods could have been used in various ways, whereas the finished cloth backing has a much more limited use and is peculiarly adapted for use in the manufacture of coated abrasives.

Although some points of comparison of the products in the *Tower* case differed with criteria relied upon by the court in the *Burstrom* case, it is clear that differences in *commercial nomenclature* and *usage* of the exported and imported products influenced the court's conclusion in both cases, as indeed, it does in the instant case. And as to plaintiff's argument that a change in classification does not result from the foreign processing of the exported product [i.e., both the greige goods and the finished fabric would be classifiable under the provision for woven fabrics, of man-made fibers, in TSUS item 338.30], this circumstance is "immaterial where the foreign processing has created a new article." *A. F. Burstrom* v. *United States*, *supra*, p. 30.

If the only change made in the exported greige goods in this case was in the dyeing of the material, as was the fact in *Amity Fabrics, Inc.* v. *United States*, 43 Cust. Ct. 64, C.D. 2104 (1959), the judgment would be for the plaintiff. However, as has been pointed out above there were significant changes, in addition to dyeing, in the material exported to Canada in this case, and had these changes been evident in the *Amity Fabrics* case, it is submitted that the result would have been the same as here. See the holding of the court in the *Amity Fabrics* case on page 68: " . . . the identity of the goods was not lost or destroyed by the dyeing process; no new article was created; *there was no change in the character, quality, texture, or use of the merchandise*; it was merely changed in color."

The court is of the opinion that where, as here, foreign processing of an export article, to whatever degree, produces such changes in the performance characteristics of the exported article as to alter its subsequent handling and uses over that which earlier prevailed, the resultant product is of necessity a new and different article.

For the reasons stated the court is in agreement with defendant that the foreign processing created a new article of commerce. In view of this conclusion, it is unnecessary to consider defendant's alternative contention relative to inadequacy of evidence of the costs of alterations. The action is dismissed.

Judgment will be entered herein accordingly.

(C.D. 4756)

BORDER BROKERAGE COMPANY, INC. *v.* UNITED STATES

Track belts

STARE DECISIS—CUMULATIVE AND CONFLICTING EVIDENCE—RULE APPLIED

Retrial of issue as to proper classification of track tread material exported from Canada for use on a Muskeg-type tracked motor

vehicle *held* controlled by *stare decisis* where the "new evidence" introduced into the record on behalf of the Government is *cumulative* and *conflicting* and does not disclose clear and convincing error. *United States* v. *Flex Track Equipment, Ltd.*, 59 CCPA 97, C.A.D. 1046 (1972), *aff'g Flex Track Equipment, Ltd.* v. *United States*, 65 Cust. Ct. 119, C.D. 4063 (1970) followed.

Court No. 70/35163

Port of Seattle

[Judgment for plaintiff.]

(Decided July 20, 1978)

Glad, Tuttle & White (*Steven W. Baker* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*William F. Atkin*, trial attorney), for the defendant.

Lamb & Lerch (*Richard J. Kaplan* and *David R. Ostheimer* of counsel) as *amicus curiae*.

RICHARDSON, Judge: The merchandise in this case consists of certain rubber track tread material made in Canada specifically for use on a Muskeg-type motor vehicle identified as a Nodwell RN–110. The track tread, in its condition as imported, is cut to length and perforated with holes in a specific pattern. After importation, the track tread is assembled with grouser bars, back plates, and nuts and bolts, to make a crawler tread which is then attached to the motor vehicle.

Similar merchandise was before the court in *Flex Track Equipment, Ltd.* v. *United States*, 65 Cust. Ct. 119, C.D. 4063 (1970), *aff'd*, *United States* v. *Flex Track Equipment, Ltd.*, 59 CCPA 97, C.A.D. 1046 (1972), wherein the courts held the merchandise to be "more than" "belting or belts, for machinery" as provided for in TSUS item 358.10 (redesignated as item 358.06) as classified in liquidation, and properly classifiable as claimed by the importer as "parts of the foregoing motor vehicles" under TSUS item 692.25 (redesignated as item 692.27). The same issue is raised anew here following the Government's limitation of the holding in C.A.D. 1046 to the entry before the court in that case (see T.D. 72–283).

In the instant case the parties have stipulated that the merchandise is a processed article cut to a specified length from a material of woven ply vegetable fiber and rubber, that the article is 15″ in width and punched with nine 16″ holes evenly spaced $4\frac{15}{16}$″ apart, three across the width, in three rows of either 82 or 67 holes each throughout the length, that the merchandise was, and similar merchandise is, ordinarily produced in accordance with standardized specifications, and, as previously indicated, that the imported merchandise is similar in

all material respects to the merchandise the subject of decision in C.D. 4063 and C.A.D. 1046. Plaintiff rests its case on the record in the *Flex Track* case which was incorporated into the record in the instant case, and moves for judgment in its favor under the doctrine of *stare decisis*. Defendant opposes the motion on the basis of what it contends is "new evidence" by means of which it seeks to avoid application of the doctrine of *stare decisis*.

Defendant's "new evidence" consists of the testimony of two industry witnesses and numerous samples of flat belting, together with some documentary exhibits. The testimony of the witnesses is directed toward three types of flat belting, i.e., conveyor belting for moving bulk materials, elevator belting for lifting bulk materials in a vertical direction, and transmission belting for transmitting power from a flat-faced pulley to another flat-faced pulley, general agreement with various definitions of the terms "belting" and "belts", identification of examples of conveyor and elevator belting which are punched with holes or equipped with cleats or ribs for particular applications, and personal appraisals of the imported merchandise as identifying either with a transmission-type belt or an elevator-type belt.

Directing his attention to the imported merchandise, the witness Raymond G. Moore, product manager of the flat belting division of B. F. Goodrich, testified on cross-examination (R. 74):

> Q. Mr. Moore, regarding the imported merchandise, you stated your belief that you would term this to be a piece cut from a belt, is that correct?—A. Yes.
>
> Q. What kind of a belt would you consider this? Would you consider it a conveyor belt?—A. I would now consider it as a track belt.

And in the same vein, the witness David Wi^se, a "technical man" for Goodyear Tire and Rubber Company, testified on cross-examination (R. 131):

> Q. You were here in court this morning?—A. Yes.
>
> Q. And you heard the description that this is assembled together, two pieces 33 feet long, side by side, assembled with grouser bars, bolts, and plates. We have two individual pieces connected together with metal bands. Would you consider that a complete track tread assembly? Would you consider that either a belt or belting?—A. I would consider it belting, yes. A belt, rather, if it is on a machine. A belt.

Neither of these witnesses testified as to any personal knowledge of or experience with the use of the imported material on the type of motor vehicle machinery for which it was intended.

In *Flex Track* the trial court called attention to the testimony of one of two witnesses who testified in the case. The court noted (p. 123):

> "Mr. Agassiz acknowledged that he referred to the material from which the imported merchandise was processed as belting or

> tread (R. 20), and that the imported merchandise is sold as 'belts', 'track treads', or 'track belts'. (R. 24, 25.)"

And earlier in the opinion the court had referred to two letters (exhibits A and B) authored by the same witness in which he had referred to the imported merchandise as "track treads or belts". Notwithstanding this evidence the court went on in *Flex Track* to hold "that the imported articles, designed as they are for a special purpose, are more than belting for machinery within the commonly accepted meaning of that term". The court pointed out that the common meaning of the term belting for machinery is defined as "a flexible kind of material passing over two or more wheels to transmit power in machinery", "serving to communicate motion from one part to another" and "a conveyor of sorts". The court noted that the imported merchandise was specially designed to do much more than transmit motion when used on motor vehicle machinery, i.e., to give the motor vehicle support, traction, and stability.

These findings were affirmed on appeal. Our appellate court said (p. 100), "We agree with the court that the imported articles were designed and processed to incorporate features that serve multiple functions which, in the language of that court, 'in sum, characterize the particular article more than any single feature or function.' "

In resisting plaintiff's motion for application of the rule of *stare decisis*, made at the conclusion of plaintiff's case, defendant argues, among other things (brief, p. 20), "Mr. Agassiz, plaintiff's first witness in *Flex Track* had no expertise as to the commercial use of the terms 'belts' and/or 'belting.' In fact, no testimony was elicited from Mr. Agassiz as to the commercial meanings of those terms."

The court finds the rule of *stare decisis* to be applicable here, and, accordingly, sustains plaintiff's motion for judgment. In the court's opinion defendant's "new evidence" is *cumulative*. Contrary to defendant's argument, the testimony of the witness Agassiz in *Flex Track* to which the trial court called attention as aforesaid had a bearing on the *commercial meaning* of the terms "belting" and "belts", and as such, the record in that case cannot be said to be devoid of such evidence. In fact, the Agassiz testimony may properly be said to be more *qualitative* on the subject of commercial meaning than that tendered by defendant's witnesses in the instant case, in view of the fact that it was related to the mode of buying and selling of the imported merchandise and the testimony of defendant's witnesses is not so related. The testimony of these witnesses (like the numerous exhibits introduced into the instant record) relates to conventional forms of belting and belts with which the witnesses are familiar, and on the basis of which, they gave opinions concerning the imported merchandise. However, these opinions were in conflict insofar as concerns the comparative relationship between the imported material and various conventional forms of belting. Consequently, in the court's

view it was never established through the "new evidence" that the imported material is in fact any one of these conventional forms of belting.

It is well settled that *cumulative* and *conflicting* evidence will not suffice to avoid application of the rule of *stare decisis*. *United States* v. *Dodge & Olcott, Inc.*, 47 CCPA 100, 103, C.A.D. 737 (1960); *John C. Rogers & Co., Inc.* v. *United States*, 63 CCPA 10, 11, C.A.D. 1158 (1975). And in the absence of a clear and convincing showing of error in the instant record application of this doctrine here is salutary.

Judgment will be entered herein for the plaintiff accordingly.

(C.D. 4757)

CASCADE CORP. *v.* UNITED STATES

Knuckleboom cranes

Knuckleboom cranes manufactured by a licensee and sold to the licensor-importer are claimed to be subject to appraisement on the basis of export value under section 402(b), Tariff Act of 1930, as amended. *Held* since plaintiff failed to establish the claimed values, the appraised values, although erroneous, must prevail as the proper dutiable values for the instant merchandise.

Appraisement on the basis of constructed value, utilizing a suggested home market retail price list, is erroneous. *Greb Industries, Ltd.* v. *United States*, 64 Cust. Ct. 608, R.D. 11691, 308 F. Supp. 88 (1970); *Ellis Silver Co., Inc.* v. *United States*, 63 Cust. Ct. 647, R.D. 11688 (1969), *aff'd*, 67 Cust. Ct. 564, A.R.D. 293 (1971), *aff'd*, 60 CCPA 143, C.A.D. 1100 (1973).

Sales to a selected purchaser may be considered to be "freely offered" under the provisions of section 402(f)(1)(B) of the Tariff Act of 1930, as amended. *D. H. Baldwin Co. et al.* v. *United States*, 65 CCPA 67, C.A.D. 1208 (1978).

Mere allegations of negotiations without supportive evidence are insufficient to establish arm's length negotiations.

The market value which must be fairly reflected under section 402(f)(1)(B) of the Tariff Act of 1930, as amended, is the price which the merchandise is able to command in the market for export to the United States. *J. L. Wood* v. *United States*, 62 CCPA 25, C.A.D. 1139, 505 F. 2d 1400 (1974).

Court No. 75-2-00493

Port of Portland, Oreg.

[Judgment for defendant.]

(Decided August 2, 1978)

Glad, Tuttle & White (*Edward N. Glad* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Velta A. Melnbrencis*, trial attorney), for the defendant.

FORD, Judge: This action challenges the basis of appraisement and the appraised values of certain knuckleboom cranes. The cranes are of the 10C, 30C, and 50C series with modifications and were manufactured by Toyo Umpanki Co., Ltd. of Japan (hereinafter referred to as "TCM") under patents held by plaintiff corporation.

Appraisement was made on the basis of constructed value as defined in section 402(d), Tariff Act of 1930, as amended by the Customs Simplification Act of 1956, T.D. 54165. The appraised values, as agreed upon by the parties, were obtained from the manufacturer's suggested retail price list for the home market less ¥150,000 which represents the installation charge.

It is plaintiff's contention that said cranes are properly subject to appraisement on the basis of export value as defined in section 402(b), Tariff Act of 1930, as amended *supra*. Said value, it is claimed, is the invoiced unit prices.

The statutory provisions of section 402 of the Tariff Act of 1930, as amended *supra*, provide as follows:

> (b) EXPORT VALUE.—For the purposes of this section, the export value of imported merchandise shall be the price, at the time of exportation to the United States of the merchandise undergoing appraisement, at which such or similar merchandise is freely sold or, in the absence of sales, offered for sale in the principal markets of the country of exportation, in the usual wholesale quantities and in the ordinary course of trade, for exportation to the United States, plus, when not included in such price, the cost of all containers and coverings of whatever nature and all other expenses incidental to placing the merchandise in condition, packed ready for shipment to the United States.
>
> * * * * * * *
>
> (d) CONSTRUCTED VALUE.—For the purposes of this section, the constructed value of imported merchandise shall be the sum of—
>
> (1) the cost of materials (exclusive of any internal tax applicable in the country of exportation directly to such materials or their disposition, but remitted or refunded upon the exportation of the article in the production of which such materials are used) and of fabrication or other processing of any kind employed in producing such or similar merchandise, at a time preceding the date of exportation of the merchandise undergoing appraisement which would ordinarily permit the production of that particular merchandise in the ordinary course of business;
>
> (2) an amount for general expenses and profit equal to that usually reflected in sales of merchandise of the same general class or kind as the merchandise undergoing appraisement which are made by producers in the country of exportation, in the usual wholesale quantities and in the ordinary course of trade, for shipment to the United States; and
>
> (3) the cost of all containers and coverings of whatever nature, and all other expenses incidental to placing the

merchandise undergoing appraisement in condition, packed ready for shipment to the United States.

* * * * * * *

(f) DEFINITIONS.—For the purposes of this section—

(1) The term "freely sold or, in the absence of sales, offered for sale" means sold or, in the absence of sales, offered—

(A) to all purchasers at wholesale, or

(B) in the ordinary course of trade to one or more selected purchasers at wholesale at a price which fairly reflects the market value of the merchandise,

without restrictions as to the disposition or use of the merchandise by the purchaser, except restrictions as to such disposition or use which (i) are imposed or required by law, (ii) limit the price at which or the territory in which the merchandise may be resold, or (iii) do not substantially affect the value of the merchandise to usual purchasers at wholesale.

(2) The term "ordinary course of trade" means the conditions and practices which, for a reasonable time prior to the exportation of the merchandise undergoing appraisement, have been normal in the trade under consideration with respect to merchandise of the same class or kind as the merchandise undergoing appraisement.

* * * * * * *

(4) The term "such or similar merchandise" means merchandise in the first of the following categories in respect of which export value, United States value, or constructed value, as the case may be, can be satisfactorily determined:

(A) The merchandise undergoing appraisement and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, the merchandise undergoing appraisement.

(B) Merchandise which is identical in physical characteristics with, and was produced by another person in the same country as, the merchandise undergoing appraisement.

(C) Merchandise (i) produced in the same country and by the same person as the merchandise undergoing appraisement, (ii) like the merchandise undergoing appraisement in component material or materials and in the purposes for which used, and (iii) approximately equal in commercial value to the merchandise undergoing appraisement.

(D) Merchandise which satisfied all the requirements of subdivision (C) except that it was produced by another person.

The record consists of the official papers which were received in evidence without being marked. Four exhibits were received on behalf of plaintiff as well as the testimony of two witnesses. Defendant introduced two exhibits which were received on its behalf.

Ordinarily, by virtue of 28 U.S.C. 2635(a), the appraised value is presumed to be correct. However, in the case at bar, it has been agreed by counsel that the appraisement was based upon the manufacturer's suggested retail price list for sales in Japan. Inasmuch as the basis of appraisement is constructed value, the use of a price list to determine value, rather than utilizing the statutory requirements set forth in section 402(d) of the Tariff Act of 1930, as amended *supra*, is patently erroneous. *Greb Industries, Ltd.* v. *United States*, 64 Cust. Ct. 608, R.D. 11691, 308 F. Supp. 88 (1970); *Ellis Silver Co., Inc.* v. *United States*, 63 Cust. Ct. 647, R.D. 11688 (1969), *aff'd*, 67 Cust Ct. 564, A.R.D. 293 (1971), *aff'd*, 60 CCPA 143, C.A.D. 1100 (1973).

The permission granted to the appraising officer in ascertaining value to use "all reasonable ways and means" in section 500 of the Tariff Act of 1930, as amended by the Customs Courts Act of 1970, or the "best evidence available" as set forth in section 402(g), Tariff Act of 1930, as amended by the Customs Simplification Act of 1956, *supra*, is not carte blanche authority to contravene the statutory requirements of section 402(d) under which the appraisement herein was made.

Plaintiff contends the invoiced prices fairly reflect market value and that the negotiations for said prices were made at arm's length. The parties are not related within the provisions of section 402(g)(2) of the Tariff Act of 1930, as amended *supra*. The manufacturer does, however, manufacture said cranes as a licensee under patents held by plaintiff. TCM is the sole manufacturer of knuckleboom cranes in Japan. Plaintiff was granted the exclusive rights for the sale of said cranes in the United States as well as in certain other countries. (See paragraph 3, plaintiff's exhibit 2.) A royalty is paid by TCM to plaintiff on all sales of cranes manufactured by it except those sold to plaintiff.

Defendant claims plaintiff has failed to establish the incorrectness of the appraisement since it has not adduced testimony establishing the merchandise to be freely sold or offered for sale to anyone other than plaintiff. Additionally, as required in the case of a selected purchaser, defendant contends the sales were not made in the ordinary course of trade at prices which fairly reflect the market value.

Under the factual situation of this case involving a patented article produced by only one manufacturer in the country of exportation and sold exclusively to plaintiff in the United States, the court is of the opinion that the merchandise is freely offered to a selected purchaser within the definition of section 402(f)(1)(B). *See also D. H. Baldwin Co. et al.* v. *United States*, 65 CCPA 67, C.A.D. 1208 (1978). The court is also of the opinion that such sales were in the ordinary course of trade as defined in section 402(f)(2). While said definition refers to merchandise of the same class or kind, the record, as indicated

supra, is indicative of the fact that the imported patented crane is not of the same class or kind as cranes per se. Even if the court were to consider all cranes to be within the same basic category, there may be more than one manner of doing business in a particular industry. *Chr. Bjelland & Co., Inc.* v. *United States*, 52 CCPA 38, C.A.D. 855 (1965). In the case at bar the only knuckleboom cranes manufactured in Japan were sold exclusively to the plaintiff in the United States. Accordingly, such sales are in the ordinary course of trade.

In order to satisfy requirements that the price fairly reflects the market value as mandated in the case of a selected purchaser, plaintiff contends the sale prices were the result of arm's length negotiation. This has been sanctioned in *Spanexico, Inc.* v. *United States*, 64 CCPA 6, C.A.D. 1176, 542 F. 2d 568 (1976); *D. H. Baldwin Co. et al.* v. *United States*, *supra*. Testimony that prices were negotiated at arm's length is not sufficient where the factual situation adduced does not support it. The mere fact that the manufacturer made a profit does not of itself establish the price as one which fairly reflects the market value. The prices were arrived at, according to the affidavit of Yukio Ikigaki, plaintiff's exhibit 1, by adding a 14 percent markup of TCM's cost for general expenses and profits. The market value which must be fairly reflected under section 402(f)(1)(B) is the price which the merchandise is able to command in the market for exportation to the United States. *J. L. Wood* v. *United States*, 62 CCPA 25, C.A.D. 1139, 505 F. 2d 1400 (1974). Evidence along this line is lacking.

Exhibit B attached to exhibit 1 indicates a 40, 41 and 42 percent discount to original equipment manufacturers, both domestic and foreign, and is dated December 1, 1971. On the same date exhibit C attached to exhibit 1 indicates a 21 percent discount to distributors for both domestic and export sales.

The record indicates that $10,000 was paid by TCM for engineering design. With respect to the engineering fee, paragraph 5 of the agreement, plaintiff's exhibit 2, provides for an engineering fee of $10,000 per model group. Model group was defined as being within the load capacity range of each crane. There are three model groups before the court. However, only $10,000 was paid for the initial engineering fee on these three groups. A $50,000 fee was paid on Models 800/100 and 351 loaders which are not before the court. The agreement also provides that any substantial change or redesign required the payment of a fee to be determined by the parties not to exceed $10,000. According to witness Sorensen, there appears to have been redesign or changes for which he indicated the manufacturer was requesting increase in charges. Accordingly, they must have been substantial redesign changes. Except for the $10,000 paid on the initial engineering fee, there appears to be no further payment of

the $10,000 fee's required by the contract for the other two model groups, and there is no evidence of any engineering fees paid for redesign change. The fact that royalty fees were paid does not affect the engineering fees due since the agreement provides for payment of royalties in addition to engineering fees, as set forth in paragraph 8 of plaintiff's exhibit 2.

While witness Sorensen testified that each time there was an engineering change, TCM asked for price increases, the record nevertheless is to the contrary and establishes that the discount rate increased from 40–42 percent effective December 1, 1971 to 44–45 percent effective May 16, 1972. In addition defendant's exhibit B indicates discounts of 46 and 47 percent on Models 10C and 50C effective October 1972. In any event, the actual prices paid in yen, as shown by plaintiff's exhibit 3 for the merchandise covered thereby for the period November 1971 to October 1973, establish the prices were reduced. The reduction referred to above is based on the prices paid in November 1971 compared to the prices paid in October 1973. The discounts set forth in defendant's exhibit A, dated May 16, 1972, also indicate a decline in the prices to Cascade for every model involved. In addition, the agreement between plaintiff and TCM, paragraph 7, provides for prices to be quoted to plaintiff semiannually at "a most favored basis." The fact that testimony was adduced to the effect that the original negotiations were based on the price list (exhibit A of plaintiff's exhibit 1) and after that each order was negotiated is not sufficient. Mr. Sorensen alluded to various correspondence in each negotiation but no supportive evidence was offered. Under the circumstances in this case, mere allegations of negotiations without supportive evidence are not sufficient to establish arm's length negotiations.

Accordingly, plaintiff has failed to establish an export value. The appraised values must, therefore, stand.

Judgment will be entered accordingly.

(C.D. 4758)

INDIAN HEAD, INC. *v.* UNITED STATES

White wool yarn

BLEACHED YARN NOT "COLORED" WITHIN HEADNOTE 2(b), SCHEDULE 3

Wool yarn processed with a bleach (peroxide) and a fluorescent brightener (Uvitex) to remove the natural yellowness of the wool and make the yarn white was not "subjected to a process * * * in which color is imparted" within the definition of "colored" in headnote 2(b), schedule 3, TSUS. Therefore, the yarn was not entitled to duty-free status under item 307.60, TSUS.

COLOR NOT "IMPARTED" BY REMOVAL OF COLOR—HEADNOTE 2(b), SCHEDULE 3

The phrase in headnote 2(b), schedule 3, TSUS, "subjected to a process * * * in which color is imparted", is associated with the exemplar processes dyeing, staining, painting, printing and stenciling, each of which involves the application or addition of pigment or other colorant. Plainly, then, in headnote 2(b) Congress did not contemplate by the use of the term "imparted" a color change brought about by the removal of color.

WHITE WOOL YARN—USED FOR MAKING HOOKED RUGS—DUTY-FREE ENTRY

White wool yarn, meeting all the specifications of item 307.60, TSUS, except that it was not "colored", was not entitled to duty-free status under that provision notwithstanding its use for making hooked rugs, and was properly dutiable under item 307.64, TSUS.

WHITE NOT A "COLOR"—HEADNOTE 2(b), SCHEDULE 3, TSUS

White is not a "color" as that term is used in headnote 2(b), schedule 3, TSUS, which defines "colored".

Court No. 76-1-00142

Port of New York

[Judgment for defendant.]

(Decided August 3, 1978)

Bronz & Farrell (*Edward J. Farrell* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Madeline B. Cohen*, trial attorney), for the defendant.

NEWMAN, Judge: The centerpiece of this litigation revolves around the question of whether certain white wool yarn exported from Canada and entered at the port of New York in April and May 1975 was "colored" within the purview of headnote 2(b), schedule 3, TSUS. And encompassed within the foregoing issue, as a wheel within a wheel, is the question: is white a color?

I have concluded that the yarn was not "colored", as that term is defined in headnote 2(b) and therefore the merchandise was not entitled to duty-free entry pursuant to item 307.60, TSUS.

The regional commissioner of customs classified the yarn under the provision in item 307.64, TSUS, for "Other" yarns of wool, and assessed duty at the rate of 30 cents per pound plus 15 per centum ad valorem. Plaintiff claims that the yarn was entitled to duty-free entry pursuant to the provision in item 307.60, TSUS, for "Yarns of wool, colored, and cut into uniform lengths of not over 3 inches, in immediate packages or containers not over 6 ounces in weight including the weight of the immediate package or container".

I.

There is no dispute that the imported yarn met all of the requirements of item 307.60, TSUS, except the specification that the yarn be "colored". The term "colored", as applied to textile materials and articles, is defined in headnote 2(b) of schedule 3, TSUS, which reads:

> (b) the term "colored", as used in connection with textile materials or textile articles, means that they have been subjected to a process such as, but not limited to, dyeing, staining, painting, printing, or stenciling, in which color is imparted at any stage of manufacture to all or part of the fiber, yarn, fabric, or other textile article, except identification yarns and except marking in or on selvages;

II.

At the trial, each party presented the testimony of two witnesses, and various exhibits. Plaintiff's witnesses were: Sidney Wasch, president and chief executive officer of Bucilla, a subsidiary of Indian Head, Inc. at the time of the importations in 1975;[1] and David Hay, president and general manager of Spinrite Yarns & Dyers, Limited, the Canadian manufacturer and exporter of the wool yarn in issue. Defendant's witnesses were: Dr. Eugene M. Allen, Research Professor of Chemistry at Lehigh University, director of the university's color science laboratory, and since 1952 a specialist in color theory; and Arthur Price, Professor of Textile Science and chairman of the Textile Science Department of the Fashion Institute of Technology, a unit of the State University of New York. The official papers were received in evidence as an unmarked exhibit.

The pertinent facts concerning the processing of the imported yarn may be briefly summarized. Mr. Hay testified that the wool utilized by his firm to produce the imported yarn varied in color, "[s]ome is whiter, some is yellower, and so on", and was blended together before processing into yarn (R. 36). Hay further testified that the undesirable yellowness in the wool was removed primarily by bleaching it with peroxide "in order to make it whiter than in its original color" and "in order to get the best white possible" (R. 38, 66–67, 76); and that after the yarn had gone through the peroxide bleach, it was placed in a conventional skein dyeing machine containing an aqueous solution of water, acetic acid and "Uvitex" (R. 39).

The record further establishes that the Uvitex served as an optical fluorescent brightener to enhance the whiteness of the yarn (R. 87–88, 92–93, 95–96), while the acid functioned solely to give the wool an affinity for the Uvitex (R. 59, 61). Finally, neither the peroxide bleach nor the Uvitex imparted any color to the yarn (R. 69–70, 87, 88, 90,

[1] Bucilla, formerly named the Bernard Ulmann Company, was a wholly owned subsidiary of the plaintiff corporation at the time of the importations (R. 21, 23, 27). However, at the time of the trial, neither Bucilla nor Mr. Wasch was affiliated with the plaintiff (R. 24).

92, 93, 95–98, 107, 110), and in the textile trade "white" is generally not considered as a color (R. 104).

III.

In support of its claim that the imported yarn met the definition of "colored" in headnote 2(b), plaintiff stresses that the yarn was subjected to a process which changed the natural color of the wool to white, citing *Victor England Agencies, Inc.* v. *United States*, 50 Cust. Ct. 83, C.D. 2394 (1963). Defendant concedes that the yarn was subjected to a process, but nevertheless insists that the merchandise failed to meet the definition of "colored" in headnote 2(b), in that neither the peroxide bleach nor Uvitex imparted a color to the yarn. Further, defendant urges that white is not a color.

IV.

I agree with defendant that plaintiff has failed to sustain its burden under headnote 2(b) of establishing that the yarn was "subjected to a process * * * in which color is imparted" to the yarn. The testimony of plaintiff's witness Hay clearly shows that color was *removed* from, rather than *imparted* to, the yarn.[2] Thus, with respect to the bleaching process, Hay testified (R.67–70):

> Q. So you have gone from Plaintiff's Exhibit 4–B to 4–C. You have bleached it in order to *remove the yellowing*, the natural yellowing matter, is that correct?—A. We have bleached it in order to try and *remove* as much as possible the yellow, yellowness of the wool. [Emphasis added.]
> Q. Is that a permanent removal?—A. Nothing is permanent.
> Q. Is it the most permanent method that you can use?—A. It is the most permanent I know of.
> * * * * * * *
> Q. Going back to Plaintiff's Exhibit 4–C, which has been bleached, did this bleaching process impart a color to the wool?—A. It only is an oxidation or bleaching process, and *it doesn't impart.* All it does is make it whiter, *but it doesn't impart. We don't apply any color or apply anything.* All we use is hydrogen peroxide and metabisulfite in order to make it an alkaline bath. We bleach it in an alkaline bath. [Emphasis added.]

Moreover, Hay explained that it was the bleaching process that gave the yarn its permanent white color (R. 71):

> Q. At the end of bleaching have the goods been given as permanent a white color as you can give them as far as permanency is concerned?—A. They have been given as permanent a white color on wool as we can give it.
> Q. After bleaching?—A. Now, which one are you referring to?
> Q. Exhibit 4–C?—A. We have given it the whiteness and the most permanent that we know how to give it.

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[2] Plaintiff's witness Wasch gave no testimony concerning the processing of the yarn.

As to whether Uvitex imparted color to the yarn, Mr. Hay admitted on cross-examination (R. 76–77):

> Q. Could you say that if you put Uvitex on Plaintiff's Exhibit 4–B before it is bleached that it would be imparting a color to B?—A. I can't answer that question. I am sorry. I don't know.
> Q. Can you say whether your Uvitex imparts a color when you put Uvitex on Plaintiff's Exhibit 4–C—that it imparts a color on Plaintiff's Exhibit 4–D?—A. It makes the product much whiter.
> Q. *Does it impart a color?*—A. *I can't answer that.* * * * [Emphasis added.]

Defendant's witnesses testified unequivocably and without contradiction or rebuttal that the peroxide bleach and Uvitex removed, rather than imparted color, to the yarn (R. 87, 88, 90, 92, 93, 95–98, 107, 110). These witnesses explained that a fluorescent brightener, such as Uvitex, is a colorless compound; that by removing color a fluorescent brightener neutralizes the natural yellowness of the wool; and in that respect a brightener is analogous to a bleach (R. 87–88, 92–93, 105).

Further, in distinguishing between the removal and imparting of color, defendant's witness Professor Allen made the following distinction between dyeing and bleaching (R. 96–97):

> Q. Is bleaching an entirely different process than dyeing?—A. Well, it depends on how you define that difference. I would say, in general, yes, because in dyeing, you are adding a substance which absorbs light whereas, in bleaching, you are removing material that absorbs light. So that in that sense it is precisely the opposite.

While stating that an optical brightener is often referred to as "white dye", Professor Allen opined that such characterization was confusing, "because I believe that the function of the brightener is not to add color, but to remove it" (R. 97). Defendant's witness Price, however, testified that the treatment of yarn by bleaching it and subjecting it to an optical brightener constituted dyeing, "but not a dyeing that imparts color" (R. 107).

Plaintiff contends that the yarn in issue was colored, since under headnote 2(b) "processing" of the yarn is determinative. In this connection, plaintiff emphasizes the portion of headnote 2(b) which states that an article shall be considered "colored" if it has been "subjected to a *process* * * *" (brief p. 8). In support of its construction of headnote 2(b), plaintiff relies heavily upon *Victor England Agencies, Inc., supra*. There, the issue was whether hanging paper, possessing only its inherent or natural color, was "colored" within the meaning of that term in paragraph 1409 of the Tariff Act of 1930, as modified. Applying the doctrine of *noscitur a sociis*, the court concluded that the term "colored", when used in the statute in conjunction with such words as printed, dyed, lithographed, stained, or

bleached, referred to *applied* colors rather than to articles possessing only their natural or inherent color.

Similarly, the definition of "colored" in headnote 2(b), schedule 3, TSUS, expressly requires that the textile article be "subjected to a process * * * in which color is imparted". It should be noted that the phrase "subjected to a process * * * in which color is imparted" is associated with the exemplar processes dyeing, staining, painting, printing and stenciling, each of which involves the *application or addition of pigment or other colorant.* Plainly, then, in headnote 2(b) Congress did not contemplate by use of the term "imparted" a color change brought about by the *removal* of color, as occurred in the present merchandise. In sum, headnote 2(b) clearly requires that the textile article be subjected to a process; but plaintiff overlooks that portion of the definition which requires that the process shall *impart* color. Here, as in *Victor England Agencies, Inc.*, no color or pigment was imparted in the processing of the merchandise, and consequently the yarn was not "colored".

Plaintiff claims that whiteness was imparted to the instant yarn by the same process used by the manufacturer to impart colors to other yarns on plaintiff's color chart (exhibit 2), and hence white yarn should be regarded as "colored" under headnote 2(b). However, the record shows that the fluorescent brightener Uvitex functions differently than the dyes used in colored yarns (R. 106–107). The function of a fluorescent brightener is to absorb energy in the ultraviolet or invisible region of the spectrum, whereas the dyes in colored yarns function primarily by absorbing visible light (R. 88–90, 94–95, 100–101, 106).[3]

In *De Ronde* v. *United States*, 1 Ct. Cust. Appls. 104, T.D. 31112 (1910), the issue was whether bleacher's blue used exclusively for bleaching purposes was dutiable as a "color" under paragraph 45 of the Tariff Act of 1897, or as an unenumerated manufactured article under paragraph 6 of that act. In concluding that the bleaching agent was not a "color" within the purview of paragraph 45, the Court of Customs Appeals observed: "The purpose of its use is not to give color to the product, but to make it white" (1 Ct. Cust. Appls. at 105). Similarly here, the record is clear that the purpose of the processing with bleach and Uvitex was not to impart color to the yarn, but rather to make it white.

Plaintiff posits that the Congressional intent in item 307.60, TSUS, is the same as it was in a former provision, paragraph 1822 of the Tariff Act of 1930—to permit duty-free importation of dyed wool yarn specially designed for making hand-hooked rugs. 103 Cong. Rec. 16768 (1957). Thus, plaintiff's witness Wasch testified that the 47

[3] The court can take judicial notice of the fact that fluorescent brighteners are commonly incorporated into detergents for washing fabrics to enhance the apparent cleansing action of the detergent, and not to impart color to the fabrics.

samples of wool yarn shown on plaintiff's color chart (exhibit 2), including white yarn, were used for making hooked rugs as well as other articles (R. 18).

Fundamentally, of course, the primary source for determining Congressional intent is the language of the statute itself. *United States* v. *Esso Standard Oil Co.*, 42 CCPA 144, 151, C.A.D. 587 (1955). Item 307.60, TSUS, specifies, *inter alia*, that the yarn be "colored". To classify the instant white yarn under item 307.60 because it was used for making hooked rugs, as urged by plaintiff, would require this court to ignore the term "colored" in item 307.60. This chimerical interpretation and application of the provision would obviously violate the cardinal rule of statutory construction that, if possible, significance should be given to every word of the provision. *Superior Industries Corp.* v. *United States*, 62 Cust. Ct. 611, 613–14, C.D. 3833 (1969).

In *Superior Industries Corp.*, the court held that blue or gold billiard cloth was not classifiable as green billiard cloth notwithstanding that the blue or gold cloth was used for the identical purposes as the green cloth, viz., pool or billiard tables.

The clear statutory language of item 307.60, TSUS, manifests a Congressional intent to grant duty-free status to wool yarn meeting certain specifications, among which is the specification that the yarn be "colored". Inasmuch as I have found that the instant white yarn was not "colored", as defined in headnote 2(b), it does not fall within the purview of item 307.60, TSUS, irrespective of its use for making hooked rugs.

Plaintiff also asserts that the change in terminology from "dyed" in paragraph 1822 of the Tariff Act of 1930 to "colored" in item 307.60, TSUS, has "no particular significance" and "no change in coverage was intended" (brief, p. 9). The *Tariff Classification Study* (Nov. 1960), schedule 3, p. 5 indicates that terms such as "colored", "dyed", "printed", and "stained" were used indiscriminately in former tariff act provisions, and that the term "colored", as defined in headnote 2(b), includes such terms. Doubtlessly, then, the term "colored" in item 307.60, TSUS, embraces the former term "dyed" in paragraph 1822, but as previously pointed out herein, headnote 2(b) also explicitly *requires that color must be imparted* by the particular process applied to the textile article. Inasmuch as the manufacturer's processing did not impart color to the yarn, plaintiff's merchandise fails to meet the definition of "colored" in headnote 2(b), and consequently the yarn is not classifiable under item 307.60.[4]

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[4] Thus, even if, as contended by plaintiff, Uvitex is classified for tariff purposes as a dye and the manufacturer's processing constitutes dyeing (brief, p. 9), the bleach and Uvitex did not impart color to the yarn, and therefore the yarn was not "colored" within the purview of headnote 2(b).

Turning to the question of whether white is a color, "it is to be kept in mind that in a tariff statute Congress ordinarily employs terms in their commercial sense".[5] *Esco Manufacturing Co., aka J. Hofert Co.* v. *United States*, 63 CCPA 71, 73, C.A.D. 1167, 530 F.2d 949 (1976). In *Atlantic Aluminum & Metal Distributors, Inc.* v. *United States*, 47 CCPA 88, 91, C.A.D. 735 (1960), the Court of Customs and Patent Appeals held that the testimony introduced by the Government established that the terms "rods" and "bars" did not have a common meaning in the aluminum industry which included tubes. In this connection, the Court observed (47 CCPA at 91):

> * * * The witness called by the Government was an employee of the Reynolds Metal Company, a large producer of aluminum products. This witness was well informed, and he testified that the articles represented by exhibits 1 through 9 would not be recognized as rods or bars, but as tubing. *He also testified that the aluminum trade does not designate such articles as hollow bars or rods. This testimony is unequivocal and clearly supports the Government's position.* [Emphasis added.]

Similarly here, we have the unequivocal (and unrebutted) testimony of Professor Price, an expert in textile science and a consultant to the textile trade and fashion industry, that the general custom in the textile trade is to consider white as a "non-color" (R. 104). Moreover, both Professors Allen and Price testified emphatically that white is not a color, but rather the absence of color (R. 90, 91, 99, 110). Both of defendant's witnesses were singularly qualified to speak on the subject of whether white is a color in relation to textiles, and their testimony is entitled to considerable weight, especially since plaintiff adduced no contradictory or rebuttal evidence.

Further, an eminent lexicographic authority confirms the testimony of defendant's witnesses that white is not a "color". Thus, *The New Columbia Encyclopedia* (4th ed. 1975) states (at p. 602):

> *color*, * * *. The colors of the visible spectrum, called the elementary colors, are red, orange, yellow, green, blue, indigo, and violet; red light, having the longest wavelength, travels more rapidly through the glass than blue light, which has a shorter wavelength. Color is therefore a property of light that depends on wavelength. When light falls on an object, some of it is absorbed and some is reflected. The apparent color of an object depends on the wavelength of the light that it reflects; e.g., a red object observed in daylight appears red because it reflects only the waves producing red light. The color of a transparent object is determined by the wavelength of the light transmitted by it. An opaque object that reflects all wavelengths appears white; one that absorbs all wavelengths appears

[5] Although the term "colored", as used in item 307.60, TSUS, is defined in headnote 2(b), schedule 3, the term "color" as used in the headnote is not further defined.

black. *Black and white are not generally considered true colors* * * *. [Emphasis added.]

In *Victor England Agencies, Inc., supra*, at 86, the court stated that "white" is connotative of an absence of color, and the dictionaries so define it.

In view of the overwhelming evidence of record and lexicographic authority, I conclude that white is not a "color" within the meaning of that term as used in headnote 2(b), and for this additional reason I find that the bleach and Uvitex did not impart color to the yarn. In essence, since the imported white yarn was not "subjected to a process * * * in which color is imparted" within the purview of headnote 2(b), it was not entitled to duty-free status pursuant to item 307.60, TSUS. This action, therefore, is dismissed.

Judgment will be entered accordingly.

(C.D. 4759)

H. Reisman Corp. *v.* United States

American selling price—Vitamin B–12

American Selling Price—Freely Sold

For the purpose of determining an American selling price under section 402(e) of the Tariff Act of 1930, as amended, the price in question must be one at which all purchasers at wholesale can buy the product.

Court Nos. R69/11791, etc.

Port of New York

[Judgment for defendant.]

(Decided August 7, 1978)

Barnes, Richardson & Colburn (*Rufus E. Jarman, Jr.*, and *James Caffentzis* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Joseph I. Liebman*, trial attorney), for the defendant.

Watson, Judge: This is a dispute as to what was the American selling price [1] of vitamin B–12, U.S.P.[2] manufactured and sold by

[1] Section 402(e), Tariff Act of 1930, as amended:

(e) American Selling Price.—For the purposes of this section, the American selling price of any article produced in the United States shall be the price, including the cost of all containers and coverings of whatever nature and all other expenses incidental to placing the article in condition packed ready for delivery, at which such article is freely sold or, in the absence of sales, offered for sale for domestic consumption in the principal market of the United States, in the ordinary course of trade and in the usual wholesale quantities, or the price that the manufacturer, producer, or owner would have received or was willing to receive for such article when sold for domestic consumption in the ordinary course of trade and in the usual wholesale quantities, at the time of exportation of the imported article.

[2] Vitamin B–12 is also referred to as cyanocobalamin crystalline.

Merck & Company in 1969. There is no dispute that the American selling price of that product should determine the valuation of the seven entries of vitamin B–12, imported from England in 1969, which are the subject of this consolidated action.

During 1969 Merck sold vitamin B–12, U.S.P. to wholesale purchasers at prices ranging from $8.00 per gram down to $5.75 per gram in quantities of 50 or more grams. The wholesale purchasers were of two types, those who used the vitamin B–12 in the manufacture of pharmaceutical or food products (users) and those who resold the vitamin B–12 to users, after repackaging it in bulk form (resellers). Both types were purchasers at wholesale within the meaning of section 402(f)(3) of the Tariff Act of 1930, as amended.[3]

The price of $8.00 was the price at which the vitamin B–12 was offered for sale by Merck in its published price list and the price at which approximately 16% of its product was sold to users.

The price of $6.80 per gram, claimed by plaintiff, was the price at which Merck sold the vitamin B–12 to resellers.

The price of $5.75 per gram, alternatively claimed by plaintiff, was that price to users at which the greatest quantity of vitamin B–12 was sold.

The issue in this case can therefore be stated as whether any price other than $8.00 satisfies the statutory requirements of American selling price, which, when the relevant main and definitional portions are combined, requires the price to be one at which the article is freely sold to all purchasers at wholesale, without restrictions as to use.

It would appear that the price of $8.00, simply because it was the highest price, was the only one at which *all* purchasers at wholesale could buy the article and is therefore the only one which satisfies the statutory definition. *F. B. Vandegrift & Co., Inc.* v. *United States*, 56 CCPA 105, C.A.D. 962, 410 F.2d 1259 (1969); *United States* v. *Mexican Products Co.*, 28 CCPA 80, C.A.D. 129 (1940); *Border Brokerage Co.* v. *United States*, 55 Cust. Ct. 748, A.R.D. 194 (1965).

The $6.80 price to resellers, aside from not being a price at which all purchasers at wholesale could buy, was subject to a restriction by Merck that the article must be resold. If used for other purposes the price would revert to $8.00 per gram. This was a restriction on use affecting the value of the merchandise which, under the clear language

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[3] Section 402(f)(3):

(f) DEFINITIONS.—For the purposes of this section—

* * * * * * *

(3) The term "purchasers at wholesale" means purchasers who buy in the usual wholesale quantities for industrial use or for resale otherwise than at retail; or, if there are no such purchasers, then all other purchasers for resale who buy in the usual wholesale quantities; or, if there are no purchasers in either of the foregoing categories, then all other purchasers who buy in the usual wholesale quantities.

of section 402(f)(1), prevents the consideration of these sales as "freely sold." [4]

The $5.75 price to users at which the largest quantities were sold was nevertheless not a price at which all purchasers at wholesale could buy and could therefore not be the price which satisfies the statutory requirements.

Plaintiff raises the specter of a situation in which only one out of a thousand sales is made at the putatively controlling list price while the remainder are at a lower price. However, it is not necessary to rely here on any principle beyond that which requires the sales at the "American selling price" to be of some reasonable significance and for there not to be a gross or shocking imbalance between the practical significance or commercial meaningfulness of the sales at the higher price and the sales at lower prices. It is enough to note that the price of $8.00 is not subject to question on this point.

For the above reasons, plaintiff has failed to disprove the correctness of the appraised value of $8.00 per gram and its claims must be overruled.

Judgment will enter accordingly.

(C.D. 4760)

ALUMINUM HOUSEWARES CO., INC. *v.* UNITED STATES

Measuring spoons

SPOONS—KITCHENWARE—COMMON MEANING—ADMISSIONS

Measuring spoons exported from Japan in 1971 and classified in liquidation upon entry at San Francisco under TSUS item 650.56 as spoons which are kitchenware with base metal or nonmetal handles, *held* properly classified since they are within the common meaning of the term "spoon", are admittedly kitchenware, and are not "more than" spoons as claimed by the importer because they differ from other types of spoons inasmuch as the term "spoon" is broad in scope, embracing many varieties of spoons serving different functions.

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[4] Section 402(f)(1):

(f) DEFINITIONS.—For the purposes of this section—

(1) The term "freely sold or, in the absence of sales, offered for sale" means sold or, in the absence of sales, offered—

(A) to all purchasers at wholesale, or

(B) in the ordinary course of trade to one or more selected purchasers at wholesale at a price which fairly reflects the market value of the merchandise,

without restrictions as to the disposition or use of the merchandise by the purchaser, except restrictions as to such disposition or use which (i) are imposed or required by law, (ii) limit the price at which or the territory in which the merchandise may be resold, or (iii) do not substantially affect the value of the merchandise to usual purchasers at wholesale.

Court No. 72-1-00118

Port of San Francisco

[Dismissed.]

(Decided August 10, 1978)

Glad, Tuttle & White (*Jonathan K. Bellsey* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*William F. Atkin*, trial attorney), for the defendant.

RICHARDSON, Judge: The merchandise in this case consists of measuring spoons which were exported from Japan in February, 1971, and classified in liquidation upon entry at San Francisco, California under TSUS item 650.56 at the duty rate of 17 *per centum ad valorem* as spoons with base metal (other than stainless steel) or nonmetal handles. It is claimed by plaintiff that the merchandise should have been classified as hand tools (including table, kitchen and household implements of the character of hand tools), not specially provided for, of iron or steel, under TSUS item 651.47 as modified by T.D. 68-9 at the duty rate of 10 *per centum ad valorem*.

The imported article is described on the invoice as Item No. 2700, stainless steel four-piece measuring spoon set with plastic handles in one solid color. And each set consists of four spoons, i.e., a tablespoon, a teaspoon, a one-half teaspoon, and a one-quarter teaspoon. Although plaintiff introduced testimonial evidence at the trial with a view toward presenting a subsidiary issue as to whether the imported article is kitchenware or householdware, the posture which plaintiff heretofore assumed in its pleading eliminates such an issue. Thus, under the pleadings it is admitted that (1) the merchandise is designed to measure food in a proper amount for cooking ingredients as called for by various recipes, (2) the merchandise is used to measure food in a proper amount for cooking ingredients as called for by various recipes, (3) the merchandise is used in the kitchen, and (4) the merchandise is held and operated by the unaided hands. And put in issue under the pleading as issues of law are the allegations that (1) the merchandise is more than a spoon, and (2) the function and use of a spoon is limited to scooping food.

Bearing on these issues Richard B. Cronheim, plaintiff's president, testified that he was familiar with the item 2700 measuring spoons covered by the entry at bar and that he arranged for the purchase of the spoons from Japan, and that exhibit 1 (consisting of a set of four spoons, among other items, bound in a package) is similar in all material respects to the measuring spoons imported in this case.

The witness testified that he was responsible for the descriptive advertising in the plaintiff's price lists under which the imported article (exhibit 1) is offered for sale under the specific classification

as "Accurate Measuring Aids" while a mixing spoon (exhibit 3) is described therein under the categorization of "Kitchen Tools and Gadgets". In this connection the witness testified (R. 29–30):

> Q. Why is Plaintiff's Exhibit 1 depicted under the category for " * * * MEASURING AIDS"?—A. Because that is exactly what it is.
>
> Q. Is Plaintiff's Exhibit 1 considered to have different functions and uses from Plaintiff's Exhibit 3?—A. It certainly does.
>
> Q. Why is Plaintiff's Exhibit 1 not listed under the section for "KITCHEN TOOLS AND GADGETS"?—A. Because it really isn't a tool. It is a measuring aid, and that is the only way I could describe it to you. It has a different purpose which is simply to measure.
>
> Q. And because of that you consider its purpose as a measuring aid, which is the primary function of the Plaintiff's Exhibit 1?—A. Yes, I do.

The witness testified that he did not consider exhibit 1 to be a spoon within the lexicographical definition of a spoon because of its shape, its accuracy, and because its capacity is marked. He stated that exhibit 1 differs from teaspoons (exhibits 5 and 6) in that the edges on exhibit 1 are purposely sharp so as to enable the user to cut through solid ingredients in a canister or other storage utensil whereas the edges of tableware are not sharp inasmuch as they are intended to be placed in the mouth.

H. George Maier, a manufacturers' representative with Maier & Associates, Inc. and former president and part owner of Allied Western Distributors, Inc. [both of which are engaged in representing plaintiff as sales representatives] testified (R. 58–59):

> Q. Do you think that Plaintiff's Exhibit 1 is amenable to being used as a utensil in the consumption of food?—A. No.
>
> Q. For what reason?—A. Well, it would take an awful long time to eat very much food with these small spoons. Most measuring spoons—and I feel certain these are included in that—are sharp about the edges, and they are sharp for a purpose and that is to clearly cut whatever you are measuring.
>
> Q. In your experience of having participated in the sale of flatware in the western part of the United States, is flatware usually embossed with the capacity of the particular piece? Does a particular spoon have indicated on there that it measures one teaspoon or tablespoon?—A. I have never seen that.
>
> Q. Can a teaspoon be used as a flatware teaspoon to measure a fraction of a teaspoon accurately?—A.Not accurately.
>
> Q. What do you consider to be the primary purpose of Plaintiff's Exhibit 1?—A. Well, to correctly and accurately meter or measure an ingredient or something you might be cooking, something that you might be putting into. In my instance, it was a clothes washer.
>
> Q. And you say that flatware cannot be used to measure an exact quantity of a particular article?—A. Not in my view.

Louise Fiszer, a cooking teacher employed at the Judith Ets-Hokin School of Cooking in San Francisco, California, testified that she is familiar with exhibit 1, has personally used that type of article, has instructed her students with respect to the use of that article, and believes that the proper preparation of a recipe could be thwarted if the person preparing the recipe were to use a teaspoon or tablespoon as opposed to a measuring spoon. The witness also testified (R. 90–91):

> Q. Will you examine Plaintiff's Exhibit 1, and tell me if you believe that those are specially constructed to enable an individual to measure an exact quantity of a particular ingredient?—A. Yes.
>
> Q. In what way would they be constructed to accomplish that purpose?—A. The size of the bowl, I guess, would perform that function.
>
> Q. Is it your experience also that measuring spoons generally have sharp edges, sharper edges than flatware?—A. Yes.
>
> Q. What would be the purpose of a sharp edge on measuring spoons?—A. To scoop things out more readily and easily, to cut through something like shortening which it would just really cut right there.

The foregoing comprises the substance of evidence offered by plaintiff on the issue of "more than" a spoon. Plaintiff argues (brief, p. 19):

> It is evident that the imported articles have a more limited and specific function than spoons in general. The articles in issue are designed and constructed to measure accurately. To this end, they are marked to indicate an exact quantity, and their sharp edges facilitate the scooping of the ingredient to be measured. They generally cannot be used for eating because they are too small, and their sharp edges would cut the tongue. The shape of the bowl of the imported measuring spoon is also significantly different from the shape of spoons, examples of which were introduced as Exhibits 5 and 6.

The government contends that the imported measuring spoons are not more than spoons. The government argues that none of the so-called "limited" and "specific" functions of measuring spoons detract from their being classified as spoons.

The court is in agreement with defendant. In the court's view the imported measuring spoons, of which exhibit 1 is a sample, are spoons within the meaning of item 650.56. In *The Englishtown Corporation* v. *United States*, 64 CCPA 84, C.A.D. 1187, 553 F.2d 1258 (1977) our appellate court reaffirmed its earlier position on the "more than" doctrine enunciated in *E. Green & Son (New York), Inc.* v. *United States*, 59 CCPA 31, 34, C.A.D. 1032, 450 F.2d 1396, 1398 (1971) wherein the court stated:

> In order to determine if an article is more than that provided for in a particular tariff provision, it is necessary to ascertain the

common meaning of the tariff provision and compare it with the merchandise at issue.

Webster's Third New International Dictionary of the English Language, p. 2205 (1966) defines a "spoon" as:

> [A] usu. metal, plastic, or wooden eating or cooking implement consisting of a small oval or round shallow bowl with a handle—often used in combination [e.g., teaspoon]

and *Funk & Wagnalls New Standard Dictionary of the English Language*, p. 2349 (1956) defines the term "spoon" as:

> A utensil having a shallow ovoid bowl and a handle, used in preparing, serving, or eating food.

As employed in item 650.56, the term "spoons" is qualified, among other things, by the phrase "which are kitchen or table ware". *Webster's Third New International Dictionary of the English Language*, p. 1247 (1966) defines "kitchenware" as "hardware (as cutlery and cooking utensils) for kitchen use." And in view of the admissions made by the parties as framed by paragraphs 10 through 13 of the complaint, it is clear that the imported merchandise comes within the ambit of the common meaning of the terms "spoon" and "kitchenware". The imported merchandise, as exemplified by exhibit 1, has a shallow bowl and a handle, and is used in the kitchen in cooking or preparing food.

The common meaning of the term "spoon" is palpably broad, encompassing many articles whose identification as such is invariably qualified by reference to some specific function performed. Thus, a teaspoon is so named because it is used to stir sugar in tea. The same can be said with respect to *slotted* spoons, *mixing* spoons, *stirring* spoons, *mustard* spoons, *table*spoons, *dessert* spoons, *grapefruit* spoons, *fruit* spoons, *sugar* spoons, *relish* spoons, *soup* spoons, *serving* spoons, *salad* spoons. And by the same token *measuring* spoons are so named because of their specific function of apportioning exact quantities. In fact, a mere reference to the term "spoon" without a prefix denoting function is meaningless in terms of identifying any particular kind of spoon. Obviously, therefore, variation in function between spoons cannot be the basis for denominating one article a spoon and another not a spoon, as plaintiff seems inclined to do.

It is noted that one lexicon to which the court's attention has been called expressly includes *measuring* spoon in its definition of the term "spoon". See 25 *Encyclopedia Americana* 528 (1973) wherein a spoon is defined as:

> [A]n implement consisting of a shallow bowl and a handle, used chiefly for handling food. It may also be used ceremonially or for *measuring*. [Emphasis added.]

Hence, a measuring spoon does not become "more than" a spoon merely because it differs from some other variety of spoon with which it may be compared. And since the measuring spoons at bar are within the common meaning of the term "spoon", and are admittedly kitchenware, it follows that plaintiff has failed to rebut the presumption of correctness attaching to the classification of the imported articles under the provision for spoons which are kitchenware in item 650.56.

In view of this conclusion the court does not reach plaintiff's claim for classification of the merchandise under item 651.47—a classification provision which is at best *residual.*

Protest No. 28091–001569 is severed, and dismissed for untimeliness. The action is dismissed. Judgment will be entered herein accordingly.

C.D. 4761

Hambro Automotive Corporation v. United States

On Defendant's Motion to Dismiss

Court Nos. 70/55539, etc.

Ports of Chicago, Houston and San Francisco

[Motion granted.]

Dated August 17, 1978

Alan S. Hays for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Velta A. Melnbrencis,* trial attorney), for the defendant.

Memorandum Opinion and Order

Watson, Judge: Defendant has moved to dismiss this consolidated action for lack of jurisdiction. The action challenges the denial of protests which plaintiff filed when its requests for reliquidation of the involved entries under section 520(c)(1) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1520(c)(1) (1964),[1] were refused by the

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[1] Section 520(c)(1), as amended, 19 U.S.C. 1520(c)(1) (1964), reads as follows:

§ 1520. Refunds and errors.

* * * * * * *

(c) Notwithstanding a valid protest was not filed, the Secretary of the Treasury may authorize a collector to reliquidate an entry to correct—

(1) a clerical error, mistake of fact, or other inadvertence not amounting to an error in the construction of a law, adverse to the importer and manifest from the record or established by documentary evidence, in any entry, liquidation, appraisement, or other customs transaction, when the error, mistake, or inadvertence is brought to the attention of the customs service within one year after the date of entry, appraisement, or transaction, or within sixty days after liquidation or exaction when the liquidation or exaction is made more than ten months after the date of the entry, appraisement, or transaction;

appropriate customs officials. Plaintiff made the requests for reliquidation in order to correct alleged errors in the appraised values of automobiles which it imported in 1959, 1960 and 1961, which errors assertedly arose from mistaken value information supplied to customs by the manufacturer.

Defendant advances a number of grounds for dismissal, all of which the court finds to be meritorious. They are the finality of an earlier customs refusal to reliquidate in a majority of the cases, the inappropriateness of section 520(c)(1) to correct the errors made and, in any event, plaintiff's failure to comply with the procedural requirements of section 520(c)(1).

Fifty-two of the entries involved in this action were the subjects of earlier unprotested refusals to reliquidate. Thus, prior to the filing of the 1970 protests here involved against refusals to reliquidate, which are the asserted bases for the protests, the decisions of the appropriate customs officials in 1964, 1965 and 1968, refusing to reliquidate 18 San Francisco entries,[2] 5 Chicago entries [3] and 29 Houston entries,[4] became final and unassailable as provided in 19 U.S.C. § 1514 (1964).[5] Consequently the treatment of those entries cannot be further challenged and the action must be dismissed as to them for that reason.

Of the remaining entries virtually all are subject to a dual defect: the asserted errors sought to be corrected were not the type subject to correction under section 520(c)(1) and the plaintiff did not, in any event, bring the errors to the attention of customs in the manner and within the time required.

The errors sought to be corrected consisted of the use by the manufacturer of general expenses and profits in the home market rather than those of the export market in the cost of production figures it supplied to customs. This mistake is now expressed more diffusely as a misunderstanding of American accounting terms and expressions.

However it is expressed the mistakes which were made must be considered as being, in essence, misunderstandings of the law, namely,

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[2] Entry Nos. 16137, 16138, 17506, 17651, 18785, 18786, 18787, 18788, 19223, 19979, 19980, 21999, 24642, 25041, 28307, 30711, 31972, and 33730.

[3] Entry Nos. 4556, 6152, 6179, 6881, and 6892.

[4] Entry Nos. 130-H, 698-H, 1756-H, 1761-H, 1806-H, 1807-H, 2026-H, 2384-H, 2385-H, 2765-H, 2808-H, 2809-H, 2882-H, 3090-H, 3266-H, 3449-H, 3637-H, 3667-H, 3673-H, 4177-H, 4178-H, 4609-H, 5107-H, 5542-H, 5648-H, 5702-H, 5954-H, 6509-H, and 2801-H.

[5] 19 U.S.C. § 1514 (1964) reads in relevant part as follows:

§ 1514. Protest against collector's decisions.

[All decisions of the collector . . . or his refusal to reliquidate any entry for a clerical error . . . shall, upon the expiration of sixty days after the date of such . . . refusal, be final and conclusive upon all persons . . . unless the importer . . . shall, within sixty days after . . . such . . . refusal . . . file a protest in writing with the collector setting forth distinctly and specifically, and in respect to each . . . refusal, the reasons for the objection thereto.

the law governing cost of production, section 402a(f) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1402(f).[6] The mistakes were interpretational and decisional. They were not the careless mistakes in routine office tasks, the consequences of which section 520(c)(1) was intended to alleviate. *See Morimura Bros.* v. *United States*, 160 F. 280 (1908). *See also S. Yamada* v. *United States*, 26 CCPA 89, T.D. 49628 (1938).

Aside from the fundamental inapplicability of section 520(c)(1), in only three of these entries[7] did plaintiff bring the alleged errors to the attention of customs in the required manner, that is to say, within the proper time and with sufficient particularity to allow remedial action. *United China & Glass Co.* v. *United States*, 66 Cust. Ct. 207, C.D. 4191 (1971).

Plaintiff raises a number of issues of fact and law which, though they may represent disputes between the parties, are not relevant to the decision of this motion. The circumstances which give rise to the necessity of dismissal, that is to say, the prior unprotested refusals to reliquidate, the mistakes sought to be corrected and the failure to timely identify the specific entries containing mistakes, are not in dispute. They require a finding that the protests underlying this action were brought to protest decisions regarding matters which could not be protested, either because of the passage of time, the inappropriateness of section 520(c)(1) to the accomplishment of the change in value sought by plaintiff or the failure of plaintiff to comply with the notice requirements of that section. Not being valid protests, their denial is not a matter within the jurisdiction of the court.

Consequently the court cannot reach plaintiff's ultimate claim that it is entitled to a refund of duties. Nor can the court consider plaintiff's related arguments that customs officials acted illegally or in contravention of a ruling or administrative practice in not with-

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[6] Section 402a(f), as amended, 19 U.S.C. § 1402(f), provides:

(f) COST OF PRODUCTION.—For the purpose of this title the cost of production of imported merchandise shall be the sum of—

(1) The cost of materials of, and of fabrication, manipulation, or other process employed in manufacturing or producing such or similar merchandise, at a time preceding the date of exportation of the particular merchandise under consideration which would ordinarily permit the manufacture or production of the particular merchandise under consideration in the usual course of business;

(2) The usual general expenses (not less than 10 per centum of such cost) in the case of such or similar merchandise;

(3) The cost of all containers and coverings of whatever nature, and all other costs, charges, and expenses incident to placing the particular merchandise under consideration in condition, packed ready for shipment to the United States; and

(4) An addition for profit (not less than 8 per centum of the sum of the amounts found under paragraphs (1) and (2) of this subdivision) equal to the profit which ordinarily is added, in the case of merchandise of the same general character as the particular merchandise under consideration, by manufacturers or producers in the country of manufacture or production who are engaged in the production or manufacture of merchandise of the same class or kind.

[7] San Francisco entry Nos. 16020, 16022, and 17118 were on a list attached to a letter dated July 17, 1962, sent by counsel for plaintiff to the collector of customs at San Francisco.

holding appraisements or in appraising the importations based on incorrect information or in allowing some 520(c)(1) corrections to be made and not others.

In actuality this action represents a valiant attempt to salvage claims which had been allowed to atrophy because of a lack of close attention by plaintiff, a lack of coordination between it and the manufacturer, and a general confusion surrounding the appraisement of these importations, to which defendant contributed.

None of this however can obviate the fact that the jurisdiction of this court can be invoked only by certain very specific and narrowly constructed procedures, one of which is the existence of a properly made protest against a decision which is protestable within the meaning of 19 U.S.C. § 1514. Such protests were lacking in this action, and the action must be dismissed.

It is therefore

ORDERED that this action be, and the same hereby is, dismissed.

(C.D. 4762)

HISMOCO (AMERICAN) CO. *v.* UNITED STATES

On Plaintiff's Motion and Defendant's Cross-Motion for Summary Judgment

Court No. 76-9-02065

Port of Los Angeles

[Plaintiff's motion denied; defendant's cross-motion granted.]

(Decided August 28, 1978)

Glad, Tuttle & White (*Edward N. Glad* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Jerry P. Wiskin*, trial attorney), for the defendant.

MALETZ, Judge: This action, which is before the court on cross-motions for summary judgment, involves the dutiable status of merchandise consisting of dried salted plums, invoiced as "Dried Plums" which was exported from Hong Kong and entered at the port of Los Angeles in November 1973. The merchandise was classified by the government under item 149.28 of the Tariff Schedules of the United States (TSUS), as modified by T.D. 68-9, which covers plums, prunes, and prunelles, otherwise prepared or preserved, and assessed with duty at the rate of 17.5% ad valorem. Plaintiff chal-

lenges this classification and claims the imported merchandise is properly classifiable as "plums [prunes] dried" under item 149.26, dutiable at the rate of 2¢ per pound.

The provisions of TSUS pertinent to the classification and claim are as follows:

Schedule 1, Part 9, Subpart B

Subpart B headnote:

1. For the purposes of this part—

* * * * * * *

(b) the term "*dried*" means dried, desiccated, or evaporated;

* * * * * * *

(e) the term "*prepared or preserved*" covers fruit which is dried, in brine, pickled, frozen, or otherwise prepared or preserved * * *.

* * * * * * *

Plums, prunes, and prunelles, fresh, or prepared or preserved:

* * * * * * *

149.24	In brine	0.1¢ per lb.
149.26	Dried	2¢ per lb.
149.28	Otherwise prepared or preserved	17.5% ad val.

Against this background, plaintiff contends that the importations are nothing more than dried plums (prunes) and therefore are more specifically provided for under item 149.26 than under item 149.28. Defendant, on the other hand, argues that the merchandise is not "dried prunes" as that term is used in the commerce of the United States and, hence, is not within the common meaning of the tariff term "prunes * * * dried," as used in item 149.26.[1] Rather, according to defendant, the imported merchandise is otherwise preserved than by drying, desiccation or evaporation, and was thus properly classified under item 149.28.

To the extent relevant to the present motions, the record consists of the pleadings; revised interrogatories directed by plaintiff to Francis M. Y. Wong, sales manager of the shipper herein, Mee Chun Canning Co. of Hong Kong; cross-interrogatories directed by defendant to Mr. Wong; five affidavits proffered by defendant; [2] and one

[1] "Prunes are certain varieties of plums, which have a firm flesh and a high sugar content that makes them adaptable to drying." *Summaries of Trade and Tariff Information* (Schedule 1, Vol. 8, 1969), p. 249. To the same effect prunes are defined in the standard dictionaries as plums capable of being or that have been dried without fermenting or spoiling. See, e.g., *Webster's New World Dictionary* (College Ed., 1966); *Webster's Third New International Dictionary* (1968); Winburne, *A Dictionary of Agricultural and Allied Terminology* (1962).

[2] Affidavits relied upon by defendant were executed by Paul A. Doemeny, a chemist at the Los Angeles Customs Laboratory; Dale C. Dunham, acting chief, Processed Products Branch, Fruit and Vegetable Quality Division, Food Safety and Quality Service, United States Department of Agriculture; Winthrop W. Dada, executive vice-president of DFA of California, a trade association of the dried fruit industry; Thomas K. Miller, vice-president for Corporate Operations, Diamond-Sunsweet, Inc., a growers' marketing cooperative, which receives dried prunes from growers and then processes, packages and markets the prunes for the cooperative members; and Martin W. Miller, professor of Food Science and Technology at the College of Agriculture and Environmental Sciences, University of California, Davis, California.

exhibit which is a copy of a March 20, 1973 letter ruling of Customs (ORR ruling 73–0364, abstracted as T.D. 73–262(25)) to the effect that prunes made from the fresh fruit which have been soaked in salt water and then sun dried are classifiable under item 149.28 as prunes otherwise prepared or preserved.

We now turn to the cross-motions which present the question as to whether the merchandise in issue is properly classifiable under item 149.26, as claimed by plaintiff, or under item 149.28, as assessed by the government. As to this, we note first that Mr. Wong, the sales manager of the shipper, the Mee Chun Canning Co. of Hong Kong (Mee Chun), described via answers to interrogatories and cross-interrogatories the manner in which the imported merchandise was processed prior to shipment to the United States. From his answers to these interrogatories and an affidavit of Mr. Doemeny, the following undisputed facts appear:

The imported merchandise consists of dried salted plums grown in Japan, Taiwan or Mainland China and purchased by Mee Chun in Hong Kong. Before shipment to Hong Kong, the fresh plums (prunes) were immersed in a salt water solution for at least 14 days and then put in the sun for drying. These semi-dried plums were shipped to Hong Kong where they were exposed to the sun for further drying by Mee Chun prior to shipment to the United States. If the semi-salted dry plums received by Mee Chun did not contain sufficient salt they were soaked in salt water for 14 days. On occasion, Mee Chun purchased fresh plums (prunes), in which case they were placed in dry salt at the ratio of 30–35 pounds of salt per 100 pounds of plums. The imported merchandise which was subjected to the two separate preparative or preservative operations of brining and drying contained 44.1% salt.[3]

It is in this context that we determine the common meaning of the term "dried prunes" bearing in mind that it is axiomatic in customs jurisprudence that the common meaning of a tariff term is presumed to be the same as its commercial meaning unless the contrary is shown. So considered, it is clear from the affidavits submitted by the defendant that the imported merchandise is *not* within the common meaning of the tariff term "prunes * * * dried" since the merchandise is not "dried prunes" as that term is used in the commerce of the United States. Thus the uncontradicted affidavits of Professor Miller, Mr. Dada, Mr. Dunham and Mr. Miller establish that brining is not a treatment normally involved in the drying of prunes in the United States. Rather, dry prunes result from the drying of fresh prune plums, by a process consisting of heat and air, or heat and water,

[3] Our appeals court and the standard dictionaries uniformly define "brine" to be "water saturated or strongly impregnated with salt." *Delapenha & Co. v. United States*, 6 Ct. Cust. Appls. 18, 19, T.D. 35232 (1915).

followed by dehydration. Chemical additives are not used other than as a mold inhibitor.

To similar import is the following statement with respect to "dried prunes" in the *Summaries of Trade and Tariff Information, supra:*

> Prunes are certain varieties of plums, which have a firm flesh and a high sugar content that makes them adaptable to drying. The bulk of the prunes grown in the United States are dried * * *. *Virtually all dried prunes are forced-air dried in dehydrating tunnels.* * * * [Emphasis added.]

The defendant's affiants are also in accord that a dried prune that had been salted prior to drying so as to contain approximately 44% salt—as is the case here—would not be a dried prune which would meet the standards for dried prunes as established by the United States Department of Agriculture.[4] Professor Miller stated that the high salt content would make the fruit more than mere dried prunes. Mr. Dada expressed the opinion that a prune product which had a salt content of 44% would not be a dried prune, but one "preserved in part due to its being salted prior to being dried." Professor Miller added that a product identified as "dried, salted prunes" is not merely a dried fruit product, but one which has been otherwise prepared or preserved due to brining.

Significantly, Mr. Wong also recognized that there is a difference between a "dried plum" and a "salted dried plum." In response to cross-interrogatory 10, Mr. Wong used different Chinese characters to identify the terms "dried plum" and "salted dried plum." Further, Mr. Wong conceded in response to cross-interrogatory 12 that: "It would be misleading and incorrect to describe 'salted dried plums' merely as 'dried plums.'" Thus, it cannot be disputed that labeling the instant merchandise as "plums * * * dried" would be misleading and incorrect.

It is to be added that plaintiff does not challenge the fact that the importations are preserved. Rather, it argues that as between the term "dried" and the term "otherwise prepared or preserved," the courts have always held that the former is more specific than the latter. In this connection, plaintiff places major reliance on the following language in *Kwan Yuen Company et al.* v. *United States*, 31 Cust. Ct. 192, 196, C.D. 1569 (1953):

* * * the term "dried" is more specific than the term "prepared or preserved," and merchandise which has been dried and additionally processed by such operations as cutting, shredding, or powdering, is classified as dried, rather than as prepared or preserved. *United States*

[4] 7 C.F.R. 52.3181 sets forth the Agriculture Department's product description of dried prunes:

> Dried prunes are prepared from sound, properly matured prune plums from which the greater portion of moisture is removed by drying. The dried prunes are cleaned to assure a wholesome product; they may be treated with water or steam; and a safe and suitable preservative may be added.

v. *Aki Co.*, 12 Ct. Cust. Appls. 415, T.D. 40588 (fish, skinned, boned, and dried); *F. H. Shallus & Co.* v. *United States*, 18 C.C.P.A. (Customs) 332, T.D. 44585 (egg albumen, dried and broken into pieces); *United States* v. *Enbun Co.*, 19 C.C.P.A. (Customs) 79, T.D. 45224 (fish, dried and shaved or shredded); *United States* v. *D. L. Moss & Co.*, 22 C.C.P.A. (Customs) 249, T.D. 47159 (egg albumen, dried and powdered); *F. F. G. Harper & Co., Inc.* v. *United States*, 27 C.C.P.A (Customs) 9, C.A.D. 53 (flake whole egg and flake egg yolk, dehydrated, "screened" into flakes, and kept in freezing temperatures); *Jacques Missir* v. *United States*, 65 Treas. Dec. 941, T.D. 47093 (figs, boiled, dried, and subjected to steam and carbon dioxide); *Naumes Forwarding Service* v. *United States*, 24 Cust. Ct. 93, C.D. 1214 (chestnuts, dried and shelled).

But there is a fundamental difficulty with this argument. The difficulty is that the present importations, for reasons already discussed, do not fall within the common meaning of the term "dried prunes" as used in item 149.26 and hence no question of relative specificity is involved at all.

Nor does *F. F. G. Harper & Co., Inc., et al.* v. *United States*, 27 CCPA 9, C.A.D. 53 (1939)—on which plaintiff also relies—support plaintiff's position in the instant case. In *Harper*, dried and flaked egg yolk was held to be properly classifiable as dried egg yolk notwithstanding that the merchandise had been frozen. In *Harper* the processing done was normal and incidental to the accepted commercial procedure for producing the end product. 27 CCPA at 11. In the present case, however, the affidavits of Mr. Miller, Mr. Dada, Mr. Dunham and Professor Miller establish that the brining of the prunes is not a normal part of the commercial process used to produce dried prunes.[5]

In sum, since the prunes have undergone two separate and distinct preservative processes they were properly classified by the government under item 149.28 which covers plums, prunes, and prunelles "otherwise prepared or preserved" rather than as prunes "dried."

For the foregoing reasons, plaintiff's motion for summary judgment is denied, defendant's cross-motion for summary judgment is granted, and the action is dismissed.

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[5] In *Border Brokerage Company, Inc.* v. *United States*, 60 Cust. Ct. 457, C.D. 3437, 284 F. Supp. 806 (1968), this court held that the blanching of certain "Fiddlehead Greens" prior to freezing was a normal and necessary step of the commercial process of freezing fresh vegetables. Thus, the court in *Border Brokerage* concluded that blanching did not make the imported vegetables "prepared other than by the process required for freezing." 60 Cust. Ct. at 489.

Similarly, *United States* v. *Enbun Co.*, 60 Treas. Dec. 733, T.D. 45224 (1931) (dried, unsalted fish which had been shaved or shredded, held to be "dried fish") and *F. H. Shallus & Co. et al.* v. *United States*, 59 Treas. Dec. 235, T.D. 44585 (1931) (egg albumen, dried and broken up, held to be "dried egg albumen") are also inapposite and do not compel a contrary result. The processing done in those cases was a normal, accepted commercial procedure *required* in the production of the end product. Clearly, the merchandise in the present action was preserved in part prior to its being dried due to its immersion in salt water. Thus, the brining procedure may not be considered incidental to the production of the end product, i.e., dry, salted prunes. For, as pointed out above, the brining step is not a normal accepted commercial procedure involved in the production of dried prunes.

(C.D. 4763)

PISTORINO & CO., INC. *v.* UNITED STATES

Models—Charts

Merchandise invoiced as "Acupuncture Dolls (Models)" *held* properly classified by Customs as other models under item 737.15 of the tariff schedules, rather than as charts under item 273.35, as claimed by plaintiff.

Court No. 73-12-03391

Port of Boston

[Judgment for defendant.]

(Decided August 29, 1978)

Doherty & Melahn (*Walter E. Doherty, Jr.*, of counsel) for the plaintiff.
Barbara Allen Babcock, Assistant Attorney General (*Edmund F. Schmidt*, trial attorney), for the defendant.

MALETZ, Judge: This case involves the proper tariff classification of merchandise invoiced as "Acupuncture Dolls (Models)" which were manufactured in and exported from the People's Republic of China and entered at the port of Boston in January 1973. Plaintiff Pistorino & Co., Inc. was the customs broker and the consignee was Sobin Chemicals, Inc.[1]

The importation consists of a kit containing a three dimensional scaled-down twenty-inch figure of a human male; a replica of a human hand also scaled down in size; a replica of a human ear; and a 36-page manual. The kit is imported in a cardboard box upon which is printed the following: "MODEL OF A HUMAN BODY SHOWING CHINESE ACUPUNCTURE POINTS AND THE COURSES OF MERIDIANS." The figure, hand and ear are crafted in soft vinyl with 361 acupuncture points and 14 longitudinal lines or meridians marked in bright colors. The acupuncture points are further identified with arabic numerals which are keyed to the 36-page manual.

The imported merchandise was classified by the government under item 737.15 of the Tariff Schedules of the United States (TSUS), as other models and assessed duty of 70% ad valorem—the column 2 rate for products of Communist countries. Plaintiff claims that the imported merchandise consists of "charts" within the meaning of TSUS and the proper classification should, therefore, be under item 273.35 which is a duty-free provision.

[1] Sobin Chemicals, Inc. is now a division of International Minerals & Chemical Corporation.

The pertinent provisions of TSUS read as follows:

Classified under:

Schedule 7, Part 5, Subpart E:

	Model trains, model airplanes, model boats, and other model articles, all the foregoing whether or not toys; and construction kits or sets for making or assembling such model articles:	Col.2
* * * * * * *		
	Other models, and construction kits or sets:	
* * * * * * *		
737.15	Other	70% ad val.

Claimed under:

Schedule 2, Part 5:

Part 5 headnotes:

1. Except for decalcomanias, labels, flaps, and bands, all of which are covered by the provisions therefor in this part, regardless of the nature of the printing thereon, this part covers only printed matter consisting essentially of textual or pictorial matter produced by any printing process, and similar matter in manuscript or typewritten form. The text may be set forth in any language by means of any kind of characters. With the exceptions above indicated, this part does not cover any article in which printing is merely incidental to the primary use of the article or in which printing is employed mainly for coloration or to produce a decorative or novelty effect (see part 4 of this schedule).

* * * * * * *		
273.35	Maps, atlases, and charts (except tourist and other literature provided for in item 270.70)	Free

Against this background, plaintiff contends that the importation is not classifiable as a model but rather is more than a model. It further contends that the tariff provision for models is limited to inanimate objects and does not include animate figures such as those in issue. And finally, according to plaintiff, the importation is within the common meaning of the word "chart." Defendant, on the other hand, maintains that the importation falls within the common meaning of the word "model."

I

The record consists of the testimony of three witnesses for the plaintiff, seven plaintiff exhibits, the testimony of two witnesses for the defendant and 14 defendant exhibits.[2]

The record shows that in 1972 Mr. Sobin purchased the importations in Canton, China for Sobin Chemicals, Inc. These importations (which in his testimony Mr. Sobin referred to as "acupuncture manikins" and as "models") were used in teaching acupuncture to students; in determinations by surgeons and anesthetists as to where acupuncture needles should be inserted to anesthetize the patient; and in acupuncture clinics to inform patients where and how acupuncture needles were to be inserted.[3]

The record further shows that about 10,000 kits were imported by Sobin Chemicals, of which some 1,500 were sold by it principally to doctors and researchers in the field of acupuncture. Sobin Chemicals never sold the kits to the general public, although it advertised them in the medical edition of Time magazine in September 1973. Stanley Marcus, of Neiman-Marcus Company of Dallas, Texas, also imported about 200 of these kits which were offered to regular Neiman-Marcus customers at $90.00 per kit for gift purposes; however, only 43 were sold.

It is to be observed that the record is replete with exhibits and testimony which consistently refer to the imported figures in the kits as "models" and the kits as "model kits." Indeed, plaintiff's witnesses themselves, in the course of their testimony, frequently referred to the imported figures as "models."

It is in this setting that we consider the testimony of plaintiff's expert witness, Terry Hardy, who, as previously indicated, was employed in the retail sales division of J. L. Hammett Company, an educational supply firm. The witness had some experience in selling

[2] The witnesses for plaintiff were: (1) Julian M. Sobin, who at the time of importation was president of the consignee, Sobin Chemicals, Inc. of Boston, Mass., a firm which imported chemicals and allied products from all over the world; (2) Dr Tsu-Liang Hsu, a thoracic surgeon who received his medical degree and acupuncture experience in Taiwan; and (3) Terry Hardy, an employee in the retail sales division of J. L. Hammett Company, an educational supply firm which sells maps, medical charts, globes and graphs to grade schools, high schools and colleges, but not to professional schools such as medical schools.

The witnesses for the defendant were: (1) Jerome Glickman, director of the Educational Media Support Center at the Boston University School of Medicine, who was employed as a medical illustrator and whose doctoral thesis was on the effectiveness of individual three-dimensional models in teaching biology and anatomy; and (2) Dr. William McNary, an associate professor of anatomy at the Boston University School of Medicine.

[3] According to the record, acupuncture is the treatment of disease by inserting very fine needles into the body at specific points called loci. In 1958 or 1959 acupuncture was used to produce analgesia for surgical operations and since that time it is reported that thousands of major operations have been performed with the use of acupuncture with patients remaining conscious, yet insensitive to pain throughout the operative procedure. Acupuncture points and meridians are not visible on the human body, although they have a certain reality to them. While they do not follow arteries and veins in the body, they do have a relationship to the nerves of the body. The points guide the acupuncturist as to where acupuncture needles are to be inserted in a patient in order to affect the proper nerves for the purpose intended.

topographical maps, medical charts, and globes. According to the witness, the imported figures—though three-dimensional—were "charts." The basis of his opinion was that the article "reminds me of looking like a chart because of the lines that accompany it." (R. 98) The witness further testified that in his opinion the imported figures would be models save for the lines or meridians appearing thereon It is to be added that the catalogue of the witness' company, the J. L. Hammett Company, designates all three-dimensional structures contained therein as "models" and all flat two-dimensional figures as "charts." In this connection, Mr. Hardy's attention was directed to a figure listed in the Hammett Company catalogue as a "Torso Model." He testified that the fact that this figure came with an accompanying 56-page manual did not preclude it from being a "model" because, in his words, "[i]t's not made as a chart, it's not sold as a chart." (R. 86) Finally, in Mr. Hardy's opinion, the longitudinal lines or meridians and points were placed on the figures here in issue by a printing process, although Mr. Hardy conceded he had no actual knowledge of the process used.

Defendant's first expert witness, Jerome Glickman, who, as previously mentioned, was director of the Educational Media Support Center at the Boston University School of Medicine, testified that he used various models as teaching and reference sources and that in his experience anatomical models (such as those of the heart or brain) are "models" even though they might contain anatomical numbering and labeling, etc., none of which are found in nature.

He defined the term "model" in the following way (R. 110):

> * * * a model * * * is defined as a three-dimensional object that represents a physical object that may or may not be present; that the surface and form of that model should be similar to the original but its dimensions and composition of the material may differ.

He defined a chart as (R. 110):

> * * * a two-dimensional display prepared on a flat surface to display the anatomy. It has no dimensional quality to it except as created by the artist in rendering form.

In Mr. Glickman's opinion, the imported articles are "models." He testified that anatomical models often have lines on them and that the presence of lines in no wise precludes the articles from being models. He further stated that the lines on the figures were hand drawn as evidenced by the visual presence of brush marks and the thickening and thinning of the lines—all of which, he indicated, are characteristic of hand application.

On cross-examination, Mr. Glickman was questioned repeatedly on whether a chart is used to "chart something traveling from one place

to another." (R. 126) In this regard he noted that the flow of blood, for example, can be understood by referring to either a chart or a model. The witness stated that a model can be used for the same purposes as a chart but that such use does not make a model a chart because "we are talking about two different things." (R. 127)

Mr. Glickman went on to testify that he had seen so-called three-dimensional "charts." These, however, were partially three-dimensional in that they had flat surfaces which had raised features, such as the raised cartography of a map showing the elevation of mountains, etc. On this aspect, the witness testified on cross-examination as follows (R. 132–3):

> Q. In other words, if an article had all of the characteristics of a chart, of a flat chart, except that it was in addition a three-dimensional object, the mere fact that it's three-dimensional would not take it out of the chart category, would it?—A. Yes. I believe it would be in the model category.
>
> Q. You say there is no such thing as a three-dimensional chart? A. Not to my knowledge. We classified that a raised bas-relief model could be a three-dimensional chart, yes.

Defendant's second expert witness was Dr. William McNary, an associate professor of anatomy at the Boston University School of Medicine. He testified that in his opinion the imported figures are models and not charts. He stated that the lines and points on the imported articles do not alter the fact that they are models and not charts. Further, in his opinion, the imported articles are not "more than" models. He indicated that the lines were put on the figures for illustrative purposes and one would not expect to see those lines on a human being. Models, he said, do not have complete accuracy and may have something on them that does not exist in the original. In fact, the witness stated that he had seen models of human lungs upon which lines have been drawn, adding that models of hearts, skulls and other parts of the human anatomy are not necessarily true representations of the human anatomy, but are models nevertheless.

Dr. McNary did not agree with the testimony of Mr. Glickman with regard to three-dimensional charts. In Dr. McNary's opinion, any object which has a three-dimensional quality—even if not complete—would be a model and not a chart.

II

Turning now to the legal aspects, it is fundamental that tariff terms are to be construed in accordance with their common meaning. It is equally fundamental that common meaning is a question of law to be determined by the court and that in determining common meaning, the court may consult dictionaries, lexicons, the testimony of record, and other reliable sources of information as an aid to its knowledge. See, e.g., Sturm, *A Manual of Customs Law* (1974), pp. 204–6.

Applying these principles, the record is persuasive in establishing that the importations are commonly known as "models." For one thing, the advertisements, catalogues, manuals and trade literature covering the importations consistently refer to them as "models." For another, the exporters and Neiman-Marcus which retailed the importations to the general public also referred to them as "models."

Beyond that, the imported merchandise is included within the dictionary definition of the term "model." Thus, *Webster's Third New International Dictionary* (1963) defines a model as follows:

> * * * 6a. a usu. miniature *three-dimensional representation* of something existing in nature or constructed or to be constructed. * * * b. a *representation* in relief or three-dimensions * * *. [Italics added.]

Persuasive also is the expert opinion of the government's two witnesses who agreed that the importations are commonly known as models and not charts. This opinion was buttressed by the numerous catalogue exhibits of companies selling anatomical or biological models, which exhibits invariably referred to three-dimensional articles as models and to two-dimensional articles as charts.

Nor can we agree with plaintiff's contention that the importations are "more than" models. In this connection, plaintiff asserts that the imported articles are used to "convey information" and to do so the manual is a necessary adjunct to the intended use of the imported figures. Thus, plaintiff insists that the use of the merchandise as a guide in locating the acupuncture points on the human body makes it more than a model.

However, item 737.15 is an *eo nomine* provision and not a use provision. E.g., *Arthur R. Sawers* v. *United States*, 60 Cust. Ct. 593, C.D. 3467, 285 F. Supp. 852 (1968). Moreover, there is nothing about the use of the merchandise which would make it either "more than" a model or "other than" a model. The expert testimony has shown that (1) it is chiefly the dimensional quality of an article which distinguishes between models and charts; (2) the lines on a model in no way change the characteristics of the merchandise from a model to a chart; (3) anatomical models with lines on them are quite common; (4) models do not have to have complete accuracy with the object being represented; and (5) models and charts are frequently used for the same purpose (e.g., to show the flow of blood). Thus, the fact that the importations have lines and points on them does not cause the merchandise to be "more than" or "other than" a model.

To like effect, it must be concluded that the manual which is imported and used with the imported figures does not preclude the merchandise from being classified as a model. Plaintiff contends that the use of the manual as a reference source is similar to that of reference

key codes or cards used with marine charts in marine navigation and in that way attempts to support its contention that the importation is a "chart." However, the record contains numerous examples of similar key codes, manuals or cards being used as a reference source with anatomical models. Indeed, even plaintiff's expert witness Mr. Hardy acknowledged that the "Torso Model" manufactured by his company was a model notwithstanding that it came with a 56-page manual. In short, the use of a reference manual in conjunction with the importation is not a distinguishing factor which would render the articles either charts or models.

Furthermore, plaintiff did not separately invoice the manual, nor does it claim that the manual is separately classifiable. The use of the imported manual is clearly subordinate to the function of the model and is reminiscent of an instruction or operational manual accompanying many products. In any event, plaintiff's argument would, at best, merely require the manual to be separately classifiable. Plaintiff has made no such claim and the classification of the manual in no way affects the classification of a three-dimensional model.

Finally, on this point, it is to be noted that if we were to follow plaintiff's reasoning and find that the manual renders the importation "more than" a *model*, we would similarly have to find that the importation is "more than" a *chart*, thus defeating plaintiff's affirmative claim. *Cf. Trans-Atlantic Co.* v. *United States*, 60 CCPA 100, 103, C.A.D. 1088, 471 F. 2d 1397, 1399 (1973).

Plaintiff next argues that the model provisions are limited to models of *inanimate* objects. The argument is without merit. The previously cited dictionary definition refers to models as being representative of "something existing in nature," under which animate objects would obviously be included. So too, in the recent decision in *Lohzin & Born, Inc.* v. *United States*, 79 Cust. Ct. 34, 41, C.D. 4710 (1977), the court found that the term "model" as it is used in the tariff schedules would include a miniature representation of a thing which "need not be an exact or accurate representation of something in existence; it is sufficient if it is more than a crude form of a class of articles and recognizably represents an article that existed in fact or legend." [4] There can be no doubt that such definition includes models of animate as well as inanimate objects.

Nor do we find any merit to plaintiff's reliance on the theory of *ejusdem generis* in this regard. First, the common meaning of the term

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[4] We reject plaintiff's contention that a model must consist of merchandise used for the making or building of something. This contention is based upon the decision in *United States* v. *American Brown Boveri Electric Corp.*, 17 CCPA 329, T.D. 43776 (1929). Plaintiff ignores the fact that this decision interpreted a use provision for a particular type of model under paragraph 1620 of the Tariff Act of 1922. The TSUS not only broadened the tariff classification for models but also provided *eo nomine* for models. There is no statutory basis for plaintiff's claim that item 737.15, TSUS, is limited to only models used for the making or building of something. (See, e.g., *Lohzin & Born*, *supra*, which involved preassembled decorative sailing ship models.)

"model" can be ascertained without resorting to this rule. For it is well settled that this rule may not be invoked to narrow, limit or circumscribe an enactment and it is never applied if the intention of the legislature can be ascertained without resort thereto. See *Sandoz Chemical Works, Inc.* v. *United States*, 50 CCPA 31, 35, C.A.D. 815 (1963). Secondly, the rule is not applicable and certainly would not limit the scope of item 737.15 to models or model articles of inanimate objects. While plaintiff points out that items 737.05 through 737.15 "appear to consist of inanimate objects," it nonetheless offers no authority for its contention that Congress intended to limit item 737.15 to models of inanimate objects. In fact, if this court were to adopt plaintiff's limited construction of the model provision, it would also preclude the classification of imported models similar to a host of anatomical and biological models depicted in the trade catalogues as models. This is exactly the type of arbitrary distinction sought to be eliminated by the tariff schedules. Finally, the plain language of item 737.15 fails to indicate any Congressional intent to distinguish between models of animate and inanimate objects. As the court said in *Hudson Shipping Co., Inc.* v. *United States*, 75 Cust. Ct. 26, 34, C.D. 4606 (1975), "it is apparent that item 737.15 * * * makes no distinction as to the types of models * * * but encompasses *all* models * * * (not otherwise specifically provided for) * * *." [Italics added.]

III

Not only has plaintiff failed to demonstrate that the government's classification of the importations under item 737.15 as models is incorrect, plaintiff has also failed to prove its affirmative claim that the importations are properly classifiable under item 273.35 as charts. The latter provision, it is to be noted, is limited by headnote 1, schedule 2, part 5, which (as previously indicated) provides as follows:

> 1. Except for decalcomanias, labels, flaps, and bands, all of which are covered by the provisions therefor in this part, regardless of the nature of the printing thereon, *this part covers only printed matter consisting essentially of textual or pictorial matter produced by any printing process* and similar matter in manuscript or typewritten form. The text may be set forth in any language by means of any kind of characters. With the exceptions above indicated, *this part does not cover any article in which printing is merely incidental to the primary use of the article or in which printing is employed mainly for coloration* or to produce a decorative or novelty effect (see part 4 of this schedule). [Italics added.]

In view of this headnote, plaintiff's claim for classification under item 273.35 as charts must be rejected for the reason without more that it failed to present any probative evidence that the imported merchandise was *printed* matter consisting essentially of textual or pictorial matter produced by a printing process.

Mr. Glickman provided the only credible testimony of record on the question whether this merchandise was produced by any printing process. The witness testified that the meridian lines on the figures were *hand drawn*. Thus, plaintiff has failed entirely to meet its burden of proving that the merchandise was produced by a printing process.

Finally, plaintiff contends that the three-dimensional quality of the importations does not prevent them from being charts. In support of this contention, it relies on *United States* v. *Buffalo Society of Natural Sciences*, 15 Ct. Cust. Appls. 1, T.D. 42128, 51 Treas. Dec. 535 (1927) and *University of North Carolina* v. *United States*, 63 Treas. Dec. 1072, T.D. 46462 (1933). The *Buffalo* case involved models of plants and animals. The *University of North Carolina* case involved a globe of the world. In each case, the models were held to be classifiable as charts under paragraph 1530 of the Tariff Act of 1922, which provided that:

> Any society or institution incorporated or established solely for religious, philosophical, educational, scientific, or literary purposes, or for the encouragement of the fine arts, or any college, academy, school, or seminary of learning in the United States, or any State or public library, may import free of duty any book, map, music, engraving, photograph, etching, lithographic print, or chart, for its own use or for the encouragement of the fine arts, and not for sale, under such rules and regulations as the Secretary of the Treasury may prescribe.

A plain reading of the decisions in *Buffalo* and *University of North Carolina* reveals that they rest solely upon the public policy behind the then paragraph 1530 of the Tariff Act of 1922. As the court stated in *Buffalo*, 15 Ct. Cust. Appls. at 4:

> Paragraph 1530 obviously was intended to extend the benefits and advantages of free entry to goods intended, *inter alia*, for educational purposes. In so doing, the Congress had in mind the public welfare. It is our duty to give this paragraph a liberal construction in order to further that purpose. * * *

These cases are clearly distinguishable from the present case for several reasons: First, in both the cited cases, the goods were imported by an institution incorporated solely for educational purposes, and the goods were imported only for the use of the institution. In the present case, by contrast, the merchandise was imported specifically for sales purposes and was not used solely for educational purposes. Thus, the public policy considerations applicable in the cited cases are entirely inapplicable here. Second, at the time both cited cases were decided there were no specific provisions for models such as contained in item 737.15, and neither case involved competing provisions for models and charts.

For all the foregoing reasons, plaintiff's claim is overruled and judgment will be entered dismissing the action.

(C.D. 4764)

BEACON CYCLE & SUPPLY CO., INC. *v.* UNITED STATES

Bicycle parts

Merchandise imported from Hong Kong consisting of a radio-headlight in a common housing was classified by customs officials as an entirety as "solid-state (tubeless) radio receivers" under item 685.23 of the tariff schedules and assessed with duty at the rate of 10.4 percent ad valorem. Plaintiff contended that the merchandise should have been classified as an entirety as "electrical articles, and electrical parts of articles, not specially provided for" under item 688.40, with a rate of duty of 6.5 percent ad valorem. Defendant conceded that the merchandise was improperly classified by customs officials and that it should properly be classified as an entirety. Defendant, however, claimed alternatively that the merchandise should properly be classified as "other parts of bicycles" under item 732.36 of the tariff schedules, with a rate of duty of 18 percent ad valorem. The rate of duty under this item is in excess of the rate assessed by the customs officials.

The court held that the imported merchandise had been improperly classified by the customs officials and was properly classifiable as alternatively claimed by defendant as "other parts of bicycles" under item 732.36 of the tariff schedules. Plaintiff's protest was overruled without affirming the classification of the customs officials.

CLASSIFICATION OF AN ENTIRETY

It is well established in customs law that if an entirety has two functions, each of which is independent and equal, the importation cannot be classified under the specific provision which covers either of the functions. A third classification must be found which encompasses both functions and which most closely describes its character as a single entity. *Remington Rand Div. of Sperry Rand Corp.* v. *United States*, 51 CCPA 57, C.A.D. 837 (1964); *Ashflash Corp.* v. *United States*, 76 Cust. Ct. 112, 412 F. Supp. 585 (1976); *V. Alexander & Co.* v. *United States*, 59 Cust. Ct. 510, 276 F. Supp. 573 (1967).

GENERAL INTERPRETATIVE RULE 10(ij)

A provision for "parts" of an article covers a product solely or chiefly used as a part of such article, but does not prevail over a specific provision for such part. However, a provision for "parts" is deemed more specific than a provision for "articles not specially provided for," and prevails over a general or "basket" provision. *J. E. Bernard & Co.* v. *United States*, 58 CCPA 91, 436 F. 2d 506 (1971); *Henry A. Wess, Inc.* v. *United States*, 79 Cust. Ct. 6, 434 F. Supp. 650 (1977); *J. E. Bernard & Co.* v. *United States*, 59 Cust. Ct. 31, C.D. 3060 (1967).

PARTS—CLASSIFICATION AS

Whether a given article is a part of another article depends on the nature of the so-called "part," and its function and purpose in relation to the article which it is designed to serve. *Gallagher & Ascher Co.* v. *United States*, 52 CCPA 11, C.A.D. 849 (1964); *Vilem B. Haan* v. *United States*, 67 Cust. Ct. 104, 332 F. Supp. 182 (1971). A signifi-

cant factor in determining whether merchandise is a "part" is whether it is dedicated for use on the article. *Victoria Distributors, Inc.* v. *United States*, 57 CCPA 76, 425 F. 2d 759 (1970); *Oxford International Corp.* v. *United States*, 70 Cust. Ct. 217, C.D. 4433 (1973). An article can be a "part" for customs duty purposes even though it is merely an "accessory" or "optional equipment." *Victoria Distributors, supra.*

CLASSIFICATION OUTSIDE LIMITS OF PLAINTIFF'S PROTEST

Where the defendant succeeds in establishing an alternative claim which provides for a rate of duty higher than that assessed by the customs officials, the court will not grant an affirmative judgment in favor of the defendant. The court will overrule the plaintiff's protest without affirming the customs classification. *See Mitsubishi International Corp.* v. *United States*, 78 Cust. Ct. 4, C.D. 4686 (1977).

Court No. 72-7-01676
Port of San Francisco

[Judgment for defendant.]

(Decided September 5, 1978

Barnes, Richardson & Colburn (*Richard C. King* and *James Caffentzis* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*David M. Cohen*, Chief, Customs Section, and *Mark K. Neville, Jr.*, trial attorney), for the defendant.

RE, Chief Judge: The question presented in this case pertains to the proper classification, for customs duty purposes, of certain merchandise imported from Hong Kong. The merchandise, described on the customs invoices as "bicycle radios complete with accessories," consists of a radio-headlight in a common housing, batteries, a lock and mounting bracket.

Each component was separately classified by the customs officials. The only portion of the classification contested by the plaintiff, and thus the only issue before this court, is the correctness of the classification of the radio-headlight component. The radio-headlight was classified by the customs officials as an entirety as "solid-state (tubeless) radio receivers" under item 685.23 of the Tariff Schedules of the United States (TSUS) with a rate of duty of 10.4 percent ad valorem.

Plaintiff contests the classification and, hence, the rate of duty assessed upon the disputed merchandise, i.e., the radio-headlights. It contends that, as an entirety, the merchandise should have been classified as "electrical articles, and electrical parts of articles, not specially provided for," under item 688.40 with a rate of duty of 6.5 percent ad valorem.

Defendant concedes that the imported merchandise is not a "solid-state (tubeless) radio receiver" under item 685.23, TSUS, and that it has been improperly classified by the customs officials. It submits an alternative classification, and contends that the merchandise

should properly and lawfully be classified as "other parts of bicycles" under item 732.36 of the tariff schedules, with a rate of duty of 18 percent ad valorem.

The pertinent provisions of the tariff schedules are as follows:

Classified by the customs officials:

Schedule 6, "Part 5. – Electrical Machinery and Equipment

* * * * * * *

Radiotelegraphic and radiotelephonic transmission and reception apparatus; radiobroadcasting and television transmission and reception apparatus, and parts thereof:

* * * * * * *

685.23 Solid-state (tubeless) radio receivers.. 10.4% ad val."

Plaintiff's claimed classification:

Schedule 6, "Part 5. – Electrical Machinery and Equipment

* * * * * * *

688.40 Electrical articles, and electrical parts of articles, not specially provided for..... 6.5% ad val."

Defendant's claimed alternative classification:

Schedule 7, "Subpart C. – Wheel Goods

* * * * * * *

Parts of bicycles:

* * * * * * *

732.36 Other parts of bicycles..... 18% ad val."

Defendant's alternative claim that the imported merchandise should be classified as "other parts of bicycles" under item 732.36 is of special significance since defendant not only seeks to reclassify the merchandise, but also because item 732.36 carries a rate of duty in excess of the rate assessed by the customs officials.

The record consists of a representative sample of the merchandise, and the testimony of the defendant's witness, Mr. Charles F. Bishop, president of Bright Star Industries, a manufacturer of bicycle accessories.

There is no dispute as to the description of the merchandise in issue. It consists of a radio-headlight in a common housing. The bracket and lock, not in dispute, permit its attachment to the handlebars of a bicycle. Both the radio and the headlight receive their power from batteries included in the merchandise but not in dispute. The radio and headlight may be operated simultaneously or separately.

The defendant has admitted that the customs officials have improperly classified the merchandise since it is well established in customs law that if an entirety has two functions, each of which is independent and equal, the importation cannot be classified under the specific tariff provision which covers either of the functions. Pertinent judicial authority teaches that a third classification must be found which encompasses both functions of the imported merchandise, and which most closely describes its character as a single entity. *Remington Rand Div. of Sperry Rand Corp.* v. *United States*, 51 CCPA 57, C.A.D. 837 (1964); *Ashflash Corp.* v. *United States*, 76 Cust. Ct. 112, 412 F. Supp. 585 (1976); *V. Alexander & Co.* v. *United States*, 59 Cust. Ct. 510, 276 F. Supp. 573 (1967).

The concept of entireties has been judicially expounded in several cases that are well known in the field of customs law. These cases indicate clearly the requirements for merchandise to be dutiable as an entirety. *See, e.g., Miniature Fashions, Inc.* v. *United States*, 54 CCPA 11, C.A.D. 894 (1966); *Gallagher & Ascher Co.* v. *United States*, 63 Cust. Ct. 223, C.D. 3899 (1969). In the *Miniature Fashions* case, the Court of Customs and Patent Appeals quoted the following explanation of the law of entireties found in the case of *Donalds Ltd.* v. *United States*, 32 Cust. Ct. 310, C.D. 1619 (1954):

> [I]f there are imported in one importation separate entities, which by their nature are obviously intended to be used as a unit, or to be joined together by mere assembly, and in such use or joining the individual identities of the separate entities are subordinated to the identity of the combined entity, duty will be imposed upon the entity they represent. 54 CCPA at 14.

In the present case, the radio and headlight were already permanently combined in a common housing when imported, and cannot be physically separated and remain operational. A single common source provides power for both functions, and the importation is a complete article of commerce. In view of the nature of the imported merchandise, the defendant has conceded that it is an entirety for customs classification purposes.

Defendant asserts that the merchandise is classifiable as "other parts of bicycles" under item 732.36, TSUS, and not as electrical articles not specially provided for, under item 688.40, TSUS, as claimed by plaintiff. In support of its claim, defendant stresses that "General Interpretative Rule 10(ij), TSUS, establishes the principle that, 'a provision for "parts" of an article covers a product solely or chiefly used as a part of such article, but does not prevail over a specific provision for such part.' " It emphasizes that since plaintiff's claimed classification under item 688.40 is not a specific provision, but rather a general or "basket" provision for electrical articles

"not specially provided for," it cannot prevail over a "parts" provision such as item 732.36, TSUS.

The courts have held on numerous occasions that a provision for "parts" is deemed more specific than a provision for "articles not specially provided for," and prevails over a general or "basket" provision. *See J. E. Bernard & Co.* v. *United States*, 58 CCPA 91, 436 F. 2d 506 (1971); *Henry A. Wess, Inc.* v. *United States*, 79 Cust. Ct. 6, 434 F. Supp. 650 (1977); *J. E. Bernard & Co.* v. *United States*, 59 Cust. Ct. 31, C.D. 3060 (1967).

Plaintiff does not dispute this principle of customs law but disagrees as to its application to this merchandise. Plaintiff readily admits that the headlight portion of the article, standing alone, would be a "part" of a bicycle under item 732.36, TSUS, but vigorously denies that the radio portion of the article can be a "part" of a bicycle. It asserts that, since the radio portion is not a "part" of a bicycle, the article as an entirety cannot be a part of a bicycle.

The defendant contends that the imported radio and headlight, as an entirety, is a "part" of a bicycle. Citing pertinent decisions of the Court of Customs and Patent Appeals, the defendant, in its brief, urges that an "article regarded by the bicycle industry as a bicycle accessory is classifiable as a bicycle part."

Originally, an article could not be a "part" for customs duty purposes unless it was "an integral, constituent, or component part, without which the article to which it is to be joined, could not *function as such article.*" *United States* v. *Willoughby Camera Stores, Inc.*, 21 CCPA 322, 324, T.D. 46851 (1933) (emphasis in original), *cert. denied*, 292 U.S. 640 (1934). *Cf. Mead Cycle Co.* v. *United States*, 28 Treas. Dec. 389, T.D. 35223 (1915). That view referred to as the "rule of essentiality," no longer prevails. It is now clear that an article can be a "part" for customs duty purposes even though it is merely an "accessory" or "optional equipment." *Victoria Distributors, Inc.* v. *United States*, 57 CCPA 76, 425 F. 2d 759 (1970); *Gallagher & Ascher Co.* v. *United States*, 52 CCPA 11, C.A.D. 849 (1964); and cases cited in *Vilem B. Haan* v. *United States*, 67 Cust. Ct. 104, 332 F. Supp. 182 (1971). *See also Mattel, Inc.* v. *United States*, 61 Cust Ct.. 75, 287 F. Supp. 999 (1968) in which Judge Maletz, writing for the court, found that wigs for dolls were "parts" even though they were referred to as "accessories." In the *Mattel* case, although the wigs were parts of dolls, by virtue of Rule 10(ij) they were nevertheless held to be classifiable under the provision which specifically covered "wigs."

In the bicycle trade, an "accessory" is "optional equipment not absolutely essential to the operation of the bicycle as a locomotion device." *Victoria Distributors, Inc.* v. *United States*, 57 CCPA at 79. The radio-headlight combination is an accessory because a bicycle

may be used without it in the performance of its primary function, that is, the transportation of passengers.

Whether a given article is a part of another article depends on the nature of the so-called "part," and its function and purpose in relation to the article which it is designed to serve. *Gallagher & Ascher Co.* v. *United States*, 52 CCPA 11, C.A.D. 849 (1964); *Vilem B. Haan* v. *United States*, 67 Cust. Ct. 104, 332 F. Supp. 182 (1971). A significant factor in determining whether merchandise is a "part" is whether it is dedicated for use on the article. *Victoria Distributors, Inc.* v. *United States*, 57 CCPA at 80; *Oxford International Corp.* v. *United States*, 70 Cust. Ct. 217, 223 n.2, C.D. 4433 (1973).

General Interpretative Rule 10(ij) provides that "a provision for 'parts' of an article covers a product solely or chiefly used as a part of such article . . . ." Defendant's witness, Mr. Charles F. Bishop, stated that the radio-headlight was designed for attachment to, and use on, a bicycle. He testified that the official sample, which was entered into evidence, would be attached to the handlebars of a bicycle by means of a mounting bracket with a screw and a lock. The mounting bracket, screw and lock are integral components of the radio-headlight. According to Mr. Bishop, the radio-headlight can be removed only by unlocking the lock and unscrewing the bolt. The method of attaching the radio-headlights to bicycle handlebars makes removal and installation difficult. On cross-examination, he testified that the merchandise not only was designed for use on a bicycle but also that it has no other reasonable use or function.

The specific and exclusive use of the radio-headlight for a bicycle is readily apparent by an examination of the official sample, which is equipped with a clamp to mount it on the handlebars of a bicycle. It has long been acknowledged by this court and the Court of Customs and Patent Appeals that official samples are potent witnesses having great probative value. *United States* v. *Halle Bros. Co.*, 20 CCPA 219, T.D. 45995 (1932); *Tilton Textile Corp.* v. *United States*, 77 Cust. Ct. 27, 424 F. Supp. 1053 (1976), *aff'd*, 65 CCPA 18, 565 F.2d 140 (1977). Thus, even in cases in which the testimony as to actual use is limited, the character and design of the official sample itself may compel a finding as to the primary use of the merchandise. *See Leaf Brands, Inc.* v. *United States*, 70 Cust. Ct. 66, 73, C.D. 4409 (1973). Except for what may be termed "fugitive" uses, the testimony and an examination of the official sample leave no doubt, and the court finds, that the merchandise has no use other than on a bicycle.

Chief use, or even the sole use, however, in and of itself does not necessarily make an importation a "part." *Robert Bosch Corp.* v. *United States*, 63 Cust. Ct. 187, 305 F. Supp. 921 (1969). To be classifiable as a "part," the merchandise must serve a useful function in

relation to the main article so that in some way it contributes to the safe or efficient operation of that article. *Victoria Distributors, Inc.* v. *United States*, 57 CCPA 76, 425 F. 2d 759 (1970); *Gallagher & Ascher Co.* v. *United States*, 52 CCPA 11, C.A.D. 849 (1964); *Hancock Gross, Inc.* v. *United States*, 76 Cust. Ct. 237, C.D. 4662 (1976); *Vilem B. Haan* v. *United States*, 67 Cust. Ct. 104, 332 F. Supp. 182 (1971). No one can doubt that measured by this standard, a bicycle headlight is a "part" of a bicycle since it provides illumination for nighttime riding. *Victoria Distributors, Inc.* v. *United States*, 57 CCPA 76, 425 F. 2d 759 (1970) (battery-operated horn-lights properly classified as parts of bicycles under Tariff Act of 1930); *Victoria Distributors, Inc.* v. *United States*, 57 CCPA 80, 425 F. 2d 763 (1970) (generator lighting sets properly classified as parts of bicycles under Tariff Act of 1930); *Oxford International Corp.* v. *United States*, 70 Cust. Ct. 217, C.D. 4433 (1973) (battery-operated horn-lights properly classified as parts of bicycles under TSUS). As noted in the *Oxford International* case, "many states require bicycles to be equipped with bicycle lamps for their safe and proper operation at night." 70 Cust. Ct. at 225.

Plaintiff agrees that a bicycle headlight is a "part" of a bicycle for customs classification purposes, but claims that the independent radio function makes the radio-headlight "more than" a bicycle part. In its brief it asserts that "the imported merchandise is concededly 'more than' headlights and therefore 'more than' parts of bicycles." It adds that "the radio portion of the imported articles, cannot be parts of bicycles as they do not contribute to the safe and efficient operation of bicycles."

In a recent discussion of the "more than" doctrine, the Court of Customs and Patent Appeals in *Englishtown Corp.* v. *United States*, 64 CCPA 84, 553 F. 2d 1258 (1977) indicated that:

> [T]here is little dispositive "doctrine" associated with the so-called "more than" doctrine. Thus, while in certain cases factors such as the "predominant function" of an article, or its possession of a "second significant function," might have been important, these factors are not uniquely dispositive. To say that an article is "more than" that described by a particular tariff provision is to say little more than that, in the opinion of the court, the provision cannot be interpreted to cover it. In making this determination, however, the advice in *Green* [*Green & Son (New York), Inc.* v. *United States*, 59 CCPA 31, 450 F. 2d 1396 (1971)] is to first determine the meaning of the tariff provision involved. 64 CCPA at 87.

It is not questioned that the imported merchandise is a commercial entity that is an entirety for customs classification purposes. The question presented, therefore, pertains to the proper classification of the entirety, consisting of the radio-headlight as a unit, and not either

of its parts or functions. It would be unrealistic to attempt to determine the nature of the bicycle radio-headlight apart from its clearly intended ultimate use. *United States* v. *Pompeo*, 43 CCPA 9, C.A.D. 602 (1955).

That the radio-headlight is designed and intended to be dedicated for use on bicycles is clear from the testimony of Mr. Bishop, and the design and appearance of the article. It is designed for bicycles, used almost exclusively on bicycles, and the unit is sold as a bicycle part. The carton in which the sample is marketed depicts the merchandise mounted on the handlebars of a bicycle, casting light in the path of the bicycle. Furthermore, it contributes to the safe and efficient operation of a bicycle because it illuminates the roadway, and warns motorists of the cyclists' presence.

The radio function or portion of the unit neither detracts from nor prevents the entirety's usefulness as a bicycle part. Merely because the radio can be played independently of the headlight does not alter the fact that the entirety at all times remains fixed to the bicycle, and contributes to its safe and efficient operation. *See Victoria Distributors, Inc.* v. *United States*, 57 CCPA 76, 425 F. 2d 759 (1970); *Gallagher & Ascher Co.* v. *United States*, 52 CCPA 11, C.A.D. 849 (1964). Furthermore, plaintiff has not introduced any evidence to prove the contrary.

Whether the radio-headlight combination is to be classified as "parts" for customs duty purposes depends upon the pertinence or applicability of the competing provisions of the tariff schedules. General Interpretative Rule 10(ij) provides that "a provision for 'parts' of an article covers a product solely or chiefly used as a part of such article, but does not prevail over a specific provision for such part." Unlike clock-radios (item 685.23, TSUS), and radio-phonograph combinations (item 685.30, TSUS), the combination article at bar is not specifically provided for in the tariff schedules. Therefore, as urged by defendant in its alternative claim, General Interpretative Rule 10(ij) does not preclude its classification as "parts." As between plaintiff's claimed classification of the merchandise as "electrical articles * * * not specially provided for" and defendant's alternative claimed classification, "other parts of bicycles," the provision for "parts" will prevail since it is deemed more specific than a provision for articles not specially provided for. *J. E. Bernard & Co.* v. *United States*, 58 CCPA 91, 436 F. 2d 506 (1971); *Henry A. Wess, Inc.* v. *United States*, 79 Cust. Ct. 6, 434 F. Supp. 650 (1977). That this result is clearly warranted may also be gleaned from the *Seventh Supplemental Report of the Tariff Classification Study*, 1963, which added the following interpretation of Rule 10(ij):

> General Headnote 10(ij) – *Parts*. A provision for "parts" does not prevail over a specific provision for such part. Thus, a pro-

> vision for "parts" is more specific than a provision for "articles, not specially provided for", but it is not more specific than provisions such as the following for: "springs" (item 652.85), "illuminating articles" (items 653.30–.40), "pumps" (items 660.90–661.15), etc.

It is conceded that the importation was improperly classified under item 685.23, TSUS, as "solid-state (tubeless) radio receivers." Based upon the applicable statutory provisions and judicial precedents, it is the determination of the court that the imported radio-headlight is properly classifiable as "other parts of bicycles" under item 732.36, TSUS, and not as "electrical articles, and electrical parts of articles, not specially provided for" under item 688.40, TSUS.

Although it has been determined that the imported merchandise is properly classifiable under item 732.36, TSUS, as alternatively claimed by the defendant, the court will not reclassify the merchandise. The cases reveal that where the defendant succeeds in establishing an alternative claim which provides for a rate of duty higher than that assessed by the customs officials, the court will not grant an affirmative judgment in favor of the defendant on its alternative claim. *See Mitsubishi International Corp.* v. *United States*, 78 Cust. Ct. 4, C.D. 4686 (1977); *J. E. Bernard & Co.* v. *United States*, 64 Cust. Ct. 525, C.D. 4029, *appeal dismissed*, 58 CCPA 165 (1970); *Randolph Rand Corp.* v. *United States*, 52 Cust. Ct. 107, C.D. 2445 (1964), *aff'd on other grounds*, 53 CCPA 24, C.A.D. 871 (1966). As stated in *Mitsubishi*, the protest "serves to establish the limits of the action instituted in this court under the provisions of 28 U.S.C: § 1582(a) (1970)," and "[t]hus, the court may not render a judgment which would reclassify the merchandise beyond the limits of the issues as framed by the protest." 78 Cust. Ct. at 19. *See also In re Solvay Process Co.*, 134 F. 678 (C.C.N.D.N.Y. 1905); *Innis Speiden & Co.* v. *United States*, 14 Cust. Ct. 121, C.D. 924 (1945). In *Speiden* this court said:

> In cases where the correct classification has been found to be outside those limits, the judgment of this and our appellate court has consistently been that the protest must be overruled without affirming the action of the collector * * *. 14 Cust. Ct. at 126.

See also *Pollard Bearings Corp.* v. *United States*, 75 Cust. Ct. 149, 405 F. Supp. 1074 (1975); *Border Brokerage Co.* v. *United States*, 64 Cust Ct. 446, C.D. 4017 (1970); *Sumitomo Shoji New York, Inc.* v. *United States*, 64 Cust. Ct. 299, C.D. 3994 (1970).

During the trial of this action the defendant initially urged that the entry covering the imported merchandise be reliquidated at the higher rate of duty. In this post trial brief the defendant stated that:

> Despite the fact that, since the passage of the Customs Courts Act of 1970, there appears to be no reason why this Court might not grant relief upon the alternative claim raised by way of an

affirmative defense, defendant does not advance a claim for such a judgment on the merits. It is sufficient for present purposes that plaintiff's protest be overruled, since in so doing, this Court will be affording prospective guidance to the Customs Service in classifying this and similar merchandise.

In effect, it is suggested that the plaintiff, by having brought this action, and the defendant, by the assertion of its alternative defense, have made it possible for the court to interpret and apply the pertinent provisions of the tariff schedules for the benefit and guidance of both importers and customs officials.

Concluding that "[g]iven the uncertainty as to the jurisdiction of this Court to enter a judgment which would result in the assessment of duties in excess of those originally assessed," the defendant stated that it was not pressing "for reliquidation pursuant to item 732.36" of the tariff schedules. This view was confirmed by a subsequent written communication to the court in which the defendant urged the court to overrule plaintiff's claim "without affirming the classification of the merchandise."

In view of the foregoing it is the determination of the court that the imported merchandise was improperly classified by the customs officials as "solid-state (tubeless) radio receivers" under item 685.23 of the tariff schedules; that it is not classifiable as "electric articles, and electric parts of articles, not specially provided for," under item 688.40 of the tariff schedules as claimed by plaintiff; and that it is properly and lawfully classifiable as "other parts of bicycles" under item 732.36 of the tariff schedules as alternatively claimed by the defendant.

Plaintiff's action is dismissed, and the protest is overruled without affirming the classification of the customs officials.

Judgment will be entered accordingly.

(C.D. 4765)

DAISY-HEDDON, DIV. VICTOR COMPTOMETER CORP. *v.* UNITED STATES

Fishing tackle

ARTICLES—OMITTED PARTS—INSUBSTANTIAL OR NONESSENTIAL

Fishing reel housings exported from Japan in 1972 and 1973 and classified in liquidation as fishing reels under TSUS item 731.20, *held*, properly classified as against the importer's claim for classification of the merchandise as parts of fishing reels under TSUS item 731.26 where the evidence shows that the so-called housings comprise a number of subassemblies and internal gearing which enables the imported merchandise to perform the circular and reciprocal motions

commonly associated with open face spinning reels and which actions are not imparted to the articles by the omitted parts necessary to complete them as fishing reels. Substantial or essential test of *Authentic Furniture Products, Inc.* v. *United States*. 61 CCPA 5, C.A.D. 1109 (1973) applied.

Court No. 75-8-02033

Port of Los Angeles

[Dismissed.]

(Decided September 6, 1978)

Stein, Shostak, Shostak & O'Hara, Inc. (*John N. Politis* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Saul Davis*, trial attorney), for the defendant.

RICHARDSON, Judge: The merchandise in this case was exported from Japan in 1972 and 1973 and is described variously on exporter's invoices as "Heddon closed face reels", "fishing reel parts" and "Heddon fly reels"; and on special customs invoices and consumption entries as "fishing reel parts", "fishing reel * * * housing" and "fishing reels". They were classified in liquidation upon entry at Los Angeles-Long Beach, California, under TSUS item 731.20, as modified by T.D. 68-9, as fishing reels valued not over $2.70 each, at the duty rate of 23 *per centum ad valorem*. It is claimed by the plaintiff-importer that the merchandise is properly classifiable under TSUS item 731.26, as modified by T.D. 68-9, as fishing reel parts, at the duty rate of 13.5 *per centum ad valorem*.

The so-called reel housings imported in this case, as well as parts necessary to complete them after importation, are illustrated in samples introduced into the record before the court. The five containers of samples of models 233, 281, 282, 283, and 284 introduced into evidence and the brochure in the respective containers, describe the contents as "Open Face Spinning Reel" and "Spinning Reel." There is no question in the court's mind, after examining the samples at length, but that the alleged housings are finished articles insofar as the state of manufacture is concerned. What they lack for completion at the time of importation is mere *assembly* with various other parts.

In the case of model 233 reel housing (exhibit 1) the parts necessary to complete the reel consists of: Spool, drag knob, side name plate, side name plate screws (3), and grease. The first four items are before the court as samples (exhibit 2). These items can be easily assembled into their proper place on the housing mechanism, to form a complete functioning reel ready for mounting on a fishing rod. It is also clear

from examining the other samples of reels that they too can be readily completely assembled.

The model 281 reel housing (exhibit 3) lacked: Spool, handle and handle nut, drag knob, spool washer, and handle shaft washer. The model 282 reel housing (exhibit 5) lacked the same parts as the model 281. The model 283 reel housing (exhibit 7) lacked: Spool, handle and handle nut, drag knob, and handle arm shaft washer. And the model 284 reel housing (exhibit 9) lacked the same parts as the model 283.

Manipulation of these reel housings discloses that they are actually more than housings *per se*. Each unit as imported is really a combination of subassemblies comprising roughly the main housing with its internal gearing, the rotating flyer assembly and reel shaft, and the bail and bail lock assemblies.

From the testimonial evidence, the court notes the following: Charles F. Barclay, plaintiff's manager of general accounting, and a fisherman for some 43 years who has become acquainted with plaintiff's products during the course of his employment by plaintiff, testified that exhibits 1, 3, 5, 7, and 9 are not sold by plaintiff as fishing reels because they simply are not fishing reels, and that they cannot be used for fishing in the condition as imported because of the missing parts. He was of the opinion that these exhibits are not substantially complete reels, reasoning that out of 60 parts comprising a completed reel, approximately 22 parts were missing.

Dennis Bunker, a manufacturer's representative for many lines of sporting goods, and an owner of a retail fishing tackle business in Burbank, Calif., testified that he is familiar with plaintiff's fishing reels as a result of selling them wholesale and retail, and has also repaired them. He stated that exhibits 1, 3, 5, 7, and 9 could not be used for fishing because they were not complete, and characterized them as a grouping of parts. He stated, however, that he had never seen them advertised, marketed or sold to the general public or to retailers as parts of reels.

John F. Betz, an owner of a company selling fishing tackle to the general public who has repaired fishing tackle for 25 to 30 years, testified that he has never seen articles similar to exhibits 1, 3, 5, 7, and 9 advertised, marketed or sold as parts or exhibited in any parts or price lists put out by fishing reel companies. He stated that a substantially complete reel is a reel with one or two parts or a spool or handle missing. He was of the opinion that exhibits 1, 3, 5, 7, and 9 are substantially complete, by which he meant an article which has a majority of its parts. He said that people have brought articles to him which would have been complete fishing reels but for the missing spool, handle and drag knob, and referred to them as fishing reels. He stated, however, that he has never sold articles like exhibits 1, 3, 5, 7, and 9 as fishing reels.

Harvey W. Sharrar, employed by Browning Arms Co., a sporting goods distributor, testified that his company sold fishing reels during the period 1972 to 1975, during which time he was a manufacturer's representative covering California. He stated that the term housing refers to an individual cast or ordinary cast part. The individual cast part does not include all the components in exhibits 1, 3, 5, 7, and 9. It includes only the outer portion. The witness said that his company sold every constituent component that goes into a spinning reel, and advertised the availability of these components. He testified that he had not seen or heard of anyone in the trade advertising, marketing, or referring to exhibits 1, 3, 5, 7, and 9 as parts. These exhibits, in his opinion, are reels minus some parts. He considered exhibits 1, 3, 5, 7, and 9 to be unfinished fishing reels, and the addition of the spool, handle, and drag knob to be a simple operation. He stated, however, that he considered the drag knob, spool, and handle to be parts even though they are made up of an assembly of parts.

Plaintiff contends that the imported articles are *parts* of fishing reels, and not *unfinished* fishing reels. Plaintiff argues that the missing reel parts are both essential and substantial.

Defendant contends that plaintiff has failed to prove that the imported merchandise is not within the common meaning of unfinished or substantially complete reels. Defendant argues, "* * * it is clear that since the imported merchandise is not recognized as 'parts' of reels but constitutes much more than mere 'parts' for fishing reels, it was properly classified as 'unfinished' reels, which were 'substantially complete' reels in the sense enunciated in *Authentic Furniture*." (Defendant's brief, p. 28.)

General Interpretative Rule 10(h) of TSUS provides that a tariff description for an article covers such an article whether it is finished or not finished. And General Interpretative Rule 10(ij) of TSUS provides that a provision for parts of an article covers a product solely or chiefly used as a part of such article. The competition between the unfinished articles and the parts provisions was the subject of decision in *Authentic Furniture Products, Inc.* v. *United States*, 61 CCPA 5, C.A.D. 1109 (1973), involving an importation of wooden headboards, footboards, posts, ladders, and guardrails for bunk beds. The only missing articles were the siderails. In that case our appellate court affirmed the trial court's finding that the siderails constituted an essential item which precluded classification of the imported merchandise as a substantially complete bunk bed. The court said (p. 7):

> We consider the application of the test, whereby the absence of a substantial or essential part precludes classification as the unfinished article itself, to be well founded in the case law so ably discussed by the lower court and aptly followed in the present case.

Applying the substantial or essential test of *Authentic Furniture* to the evidence in this case, the court finds itself in agreement with the defendant. In the court's opinion, the imported merchandise was properly classified as fishing reels within the purview of item 731.20. It is plain to see that when exhibit 1 was manipulated manually all the action that is characteristically associated with the open-face spinning reel had been built into that article.

Thus, the bail could be cocked. And then it closed upon rotation around the turning flyer. The internal gears moved and rotated the crankshaft in circular motion while at the same time causing the spool shaft to perform its customary reciprocal back and forth motion. This, to the court, constitutes the essence of a spinning reel. This action was imparted to the reel without the addition of the omitted parts. The spool, handle, and drag knob can be used to regulate, retard or refine this action. It is noted from the testimony of people dealing with the industry that they referred to such articles as exhibits 1, 3, 5, 7, and 9 as "reels."

Neither is it of any moment that a fisherman would be unable to fish with articles in the condition of exhibits 1, 3, 5, 7, and 9 at the time of importation. Without more, a fisherman would be unable to fish with a complete reel for that matter. The function of a reel of this kind is to *spin*. And the *spinning action* is achieved by the imported articles in the condition as imported.

The court is not unmindful of plaintiff's efforts to compare, among other things, the cost of the omitted parts against the cost of the imported articles with a view toward establishing the substantiality of the omitted parts. However, a cost analysis is not controlling. One always must weigh the relationship of the omitted parts against the included parts comprising the imported article and assess the significance of the omitted parts in the total scheme of things. And cost alone does not measure such significance, as where a relatively simple item may be disproportionately high in cost merely as a result of scarcity of raw material or other difficulty of acquisition.

Taking the evidence as a whole, including the samples which the court regards as potent witnesses, to say that the imported articles are not fishing reels because of the absence of the disputed parts would be to say, as defendant so aptly put it, that an automobile from which a wheel had been removed would no longer be an automobile. The court is unable to take that view on the basis of the evidence in this record.

For the reasons stated, the action must be dismissed. Judgment will be entered herein accordingly.

(C.D. 4766)

J. E. BERNARD CO. *v.* UNITED STATES

Tuning pins—Parts of stringed musical instruments

Merchandise invoiced as tuning pins is used to tighten or loosen guitar strings. It was classified by Customs under TSUS item 726.55 as "Parts of stringed musical instruments provided for in item 725.06 (except strings and tuning pins)." Plaintiff contended proper classification is under TSUS item 726.45 as "Tuning pins."

Evidence failed to overcome presumption of correctness and sustain burden of proving that classification made by Customs was erroneous and that classification urged by plaintiff was correct. *Atlantic Aluminum & Metal Distributors, Inc.* v. *United States*, 47 CCPA 88, C.A.D. 735 (1960); *United States* v. *New York Merchandise Co., Inc.*, 58 CCPA 53, C.A.D. 1004, 435 F. 2d 1315 (1970). Legislative history treated and discussed. *United States* v. *Amer. Trucking Ass'ns.*, 310 U.S. 534, 544 (1940).

EVIDENCE—PRESUMPTION—BURDEN OF PROOF

A presumption of correctness attaches to the Customs' classification and plaintiff has burden of proving not only that the classification is erroneous, but also that the classification urged by the plaintiff is correct.

LEGISLATIVE HISTORY

"When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.' " *United States* v. *Amer. Trucking Ass'ns., supra.*

Court No. 76-3-00651

Port of Chicago

[Judgment for defendant.]

(Decided September 12, 1978)

Barnes, Richardson & Colburn (*Steven P. Sonnenberg* and *Thomas D. Terpstra* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Joseph I. Liebman*, trial attorney), for the defendant.

LANDIS, Judge: This written decision of the court is the outgrowth of a trial held before me in Chicago, Ill., in August 1977. The parties thereafter successively filed briefs in May and July 1978 and a reply brief was filed by plaintiff in August 1978.

The goods in question were imported from West Germany into the Port of Chicago in November 1974 and May 1975 and were invoiced as "Tuning pins M 6 G," "Tuning pins M 6," and "Tuning pins No. 14-586/14-587."

The merchandise was classified by Customs under TSUS item 726.55, as modified,[1] as "Parts of stringed musical instruments provided for in item 725.06 (except strings and tuning pins)."

Plaintiff claims the proper classification is under TSUS item 726.45 [2] as "Tuning pins."

As stated by plaintiff in its brief, page 3:

> * * * An examination of this product [tuning pins No. 14–586/14–587] reveals that it consists of a metal pin with an opening at one end. The opposite end is fitted into a worm gear which may be actuated by a handle or button which is perpendicular to the pin. When the button is turned the worm gear acts on the pin so as to rotate it. The rotation ratio is 12 turns of the button to one turn of the pin.

The other two items are identical to each other except that the M6G is yellow-gold covered while the M6 is chrome. Although they differ in appearance from the 14–586/14–587 model, they operate under a comparable principle.

The merchandise is used as parts of guitars, to tighten or loosen the guitar strings so that the instruments have the proper pitch.

At the outset, as has been urged by plaintiff, and as has been virtually conceded by defendant, it is clear that the claimed section of TSUS, item 726.45 relied on by plaintiff, is an *eo nomine* provision.

However, on the other hand, in considering the evidence introduced in this case, we are also aware of the presumption of correctness which favors the customs classification. *Atlantic Aluminum & Metal Distributors, Inc.* v. *United States*, 47 CCPA 88, C.A.D. 735 (1960); *United States* v. *New York Merchandise Co., Inc.*, 58 CCPA 53, C.A.D. 1004, 435 F. 2d 1315 (1970).

The evidence consists of the testimony of three witnesses for the plaintiff and one for the defendant and a number of exhibits.

Stanley Snyder, a purchasing agent for Gibson Inc., the actual importer in this case, was the first to testify. He identified samples of the imported articles. For example, on direct examination, he identified plaintiff's collective exhibit 1 as "a complete set of bass machine heads or tuning pins." (R. 7.) Snyder read the invoices as stating: "One is for 500 sets of tuning pins, M–6G; the other one is for 400 sets of tuning pins, chrome-plated." (R. 12.) He identified another exhibit as "M–6 tuning pins." (R. 16.) During voir dire though, significant damage was done to plaintiff's case by the statement appearing on the cover of the box in which some of the merchandise was imported, as appears in the following testimony (R. 20–21):

> MR. TERPSTRA [plaintiff's counsel]. I would like to move plaintiff's exhibit 4 into evidence.

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[1] Modified by T.D. 68-9 and dutiable at the rate of 17 per centum ad valorem.

[2] Modified by T.D. 68-9 and dutiable at the rate of 17 cents per 1,000 pins, plus 6 per centum ad valorem.

JUDGE LANDIS. Any objection?

MR. LIEBMAN [defendant's counsel]. May I examine on voir dire, Your Honor?

JUDGE LANDIS. Yes.

MR. LIEBMAN Mr. Snyder, plaintiff's exhibit 4 for identification you described as a collective set of six of the M–6G machine heads; is that correct?

THE WITNESS. Yes.

MR. LIEBMAN. Are they contained in a box?

THE WITNESS. Yes.

MR. LIEBMAN. Is this the box that they are received in when you receive the shipment?

THE WITNESS. Yes.

MR. LIEBMAN. Is the box the same type of box enclosing the merchandise involved in the entries which are the subject of this court case?

THE WITNESS. Yes.

MR. LIEBMAN. Does the box contain on its cover any descriptions of the contents?

If you would like to, you may examine it.

[Handing to the witness.]

THE WITNESS. It says—Yes, it does. It says, "The world's finest guitar and bass machine heads."

MR. LIEBMAN. To your knowledge, does it say, anywhere on that box, "tuning pins"?

THE WITNESS. No.

Plaintiff's second witness, Julius Bellson, was a "musicologist" at Gibson approximately 40 years and in addition to composing music had served with Gibson as production manager, industrial manager, and treasurer. This witness of plaintiff stated he would not confine the definition of "tuning pin," as set forth in "Webster's New International Dictionary" (plaintiff's exhibit 6):

> *tuning pin or peg. Music.* A pin to which the strings are fastened, as in pianos and in instruments of the violin family.

to instruments such as pianos and violins, since other instruments such as guitars, mandolins and banjos have pegs. Bellson's testimony was further in substance that all of plaintiff's tuning devices were "tuners"; that a difference existed between "tuning pins" and "tuners" and he did not refer to the exhibits representing the imported merchandise in this case as "tuning pins" but as "tuners."

The third witness for plaintiff, Walter Fuller, also was a retired 40-year veteran at Gibson. He testified that he would refer to the exhibited items as tuning keys, tuning pegs, tuning pins, or machine heads depending on with whom he was speaking. Whichever appellation was used by the other party, he would use. Fuller did add that if he were preparing a parts list, he would refer to the articles as "machine heads." (R. 99).

The sole witness for defendant was Joseph Richard Merkel, president of Kluson Manufacturing Co. which manufactures and sells metal and plastic parts for stringed musical instruments. The following exchange occurred during direct examination of Mr. Merkel (R. 114):

> Q. Have you, or to your knowledge, has the Kluson Manufacturing Company ever sold a tuning pin?—A. We have never sold a tuning pin. No. That is correct.
> Q. But you have sold machine heads; is that correct?—A. Correct, we have sold machine heads.
> Q. Do you understand "machine heads" to be a different article of commerce from a "tuning pin"?—A. Yes, I do.

Based upon this evidence and having observed the witnesses and their demeanor on the witness stand, it is my opinion that the presumption of correctness attaching to the Customs' classification of this imported merchandise has not been rebutted, that plaintiff has not sustained the burden of proving the classification by Customs was erroneous and plaintiff's claimed classification was correct. Accordingly, defendant must herein prevail.[3]

It is also noted that in defendant's brief it is argued that pertinent sources of legislative history demonstrate that successive Congresses have intended the tariff provision for "tuning pins" to be limited to specially designed pins of the type for tuning pianos and harps.

Plaintiff argues in its reply brief that the legislative history is not relevant as the common meaning of the term "tuning pin" is clear and unambiguous. This argument by plaintiff is difficult to understand for, as has heretofore been pointed out, plaintiff's evidence on the meaning of the term "tuning pin" was ambiguous and in particular plaintiff's witness Bellson stated he did not agree with the dictionary definition plaintiff introduced into evidence (plaintiff's exhibit 6). It should also be noted that no claim has been made nor any contention advanced that the commercial meaning is different from the common meaning, which in the absence thereof are presumed to be the same. *August Bentkamp* v. *United States*, 40 CCPA 70, C.A.D. 500 (1952); *United States* v. *C. J. Tower & Sons of Buffalo, N.Y.*, 48 CCPA 87, C.A.D. 770 (1961).

A leading case on the significance and relevance of legislative history is *United States* v. *Amer. Trucking Ass'ns.*, 310 U.S. 534 (1940), wherein the Supreme Court of the United States stated (pp. 542–544):

> In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress. There is no invariable rule for the discovery of that intention. To take a few words from their context

[3] As plaintiff has made no showing that the imported merchandise is classifiable as "tuning pins" under TSUS item 726.45, there is no reason to consider its citation of General Interpretative Rule 10(ij).

> and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute * * *.
>
> There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one "plainly at variance with the policy of the legislation as a whole" this Court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on "superficial examination." * * *

See also, *United States* v. *Kung Chen Fur Corporation*, 38 CCPA 107, C.A.D. 447.

I now will examine the legislative history surrounding "tuning pins."

The first mention of "tuning pins" in the tariff laws appeared in the Tariff Act of 1922:

> PAR. 1443. Musical instruments and parts thereof, not specially provided for, pianoforte or player actions and parts thereof, cases for musical instruments, pitch pipes, tuning forks, tuning hammers, and metronomes, strings for musical instruments composed wholly or in part of steel or other metal, all the foregoing, 40 per centum ad valorem; *tuning pins, $1 per thousand and 35 per centum ad valorem;* violins, violas, violoncellos, and double basses, of all sizes, wholly or partly manufactured or assembled, $1 each and 35 per centum ad valorem; unassembled parts of the foregoing, 40 per centum ad valorem. Ch. 356, 42 Stat. 858, 919–920 (1922). [Emphasis supplied.]

Legislative history demonstrates that the tuning pin provision was incorporated in paragraph 1443 at the behest of the piano industry and for its benefit. Testifying before the Ways and Means Committee of the House, one Alfred L. Smith, representing the Music Industries Chamber of Commerce of New York (an umbrella organization of eleven musical national trade associations), reviewed the tariff history of piano parts. He stated [hearings on general tariff revision before the House Committee on Ways and Means, pt. 5, Schedule N, 66th Cong., 3d Sess. (1921), p. 3435]:

> * * * I wish to call the attention of the committee to the fact that prior to the war our chief imports under this schedule were certain piano parts, felts, actions, wire, and tuning pins, and also band instruments, and small instruments like violins and similar small goods. * * *

When the First World War impeded the importation of piano parts, he said "our industry was very seriously embarrassed." He explained further:

> The tuning pin, for instance, is a typical example which I will cite to the committee. The tuning pin is a vital article in piano manufacture and an exceedingly difficult thing to manufacture, although it looks very simple to the average person. Before the war there was only one plant of any importance in this country making tuning pins. There are now four well-established plants and several minor ones trying to make those. Before the war, four-fifths of the tuning pins were imported from Germany, and now the importations probably do not amount to but one-fifth. And the piano manufacturers wish to have this industry developed in this country so that they can absolutely depend upon it, so that there will be enough facilities to supply the piano manufacturers. [*Id.*, p. 3436.]

The written brief of the Music Industries Chamber of Commerce of New York stated that:

> The American tuning-pin manufacturers are still going to much time and expense in experimental work to improve quality, so that with adequate tariff protection it is reasonable to expect that the tuning pins will ultimately be sufficiently superior to the foreign article so as to be able to compete entirely on a quality instead of price basis.* * * [*Id.*, p. 3438.]

Thus the "tuning pin" provision always connoted piano pins.

Paragraph 1541(a) of the Tariff Act of 1930, Ch. 497, 46 Stat. 590, 668–669 continued the tariff provision for tuning pins:

> PAR. 1541. (a) Musical instruments and parts thereof, not specially provided for, pianoforte or player-piano actions and parts thereof, violin bow hair, pitch pipes, tuning forks, tuning hammers, and metronomes, all the foregoing, 40 per centum ad valorem; pipe organs or pipe-organ player actions and parts thereof, 60 per centum ad valorem: *Provided*, That for pipe organs or pipe-organ player actions and parts thereof especially designed and constructed for installation and use in a particular church, or in a particular public auditorium at which it is not customary to charge an admission fee, which are imported for that specific use, and which are so installed and used within one year from the date of importation, the rate of duty shall be 40 per centum ad valorem; and the Secretary of the Treasury is authorized to make all needful rules and regulations for carrying out the provisions of this clause; cases for musical instruments, 50 per centum ad valorem; chin rests for violins, 40 per centum ad valorem; bridges for fretted stringed instruments, not specially provided for, 50 per centum ad valorem; strings for musical instruments, composed wholly or in part of catgut, other gut, oriental gut, or metal, 40 per centum ad valorem; *tuning pins, $1 per thousand and 35 per centum ad valorem.* [Emphasis supplied.]

In 1948, the "Summaries of Tariff Information" contained the following "Comment" on tuning pins:

> Tuning pins are pegs for pianos and harps by which tension of the strings can be altered for changes in pitch. Steel tuning pins for pianos are slightly over 2 inches long and about one-fourth inch in diameter. The end driven into the piano plate is cylindrical; the projecting end is square to fit the tuning wrench, which is known in the trade as a hammer. Smaller but similar pins are used in harps. [1948 "Summaries of Tariff Information," vol. 15, pt. 8, p. 54.]

As the defendant notes in its brief: "Significantly, 'tuning pins' are specifically excluded from the description in the summaries of pianos and parts thereof, but no exclusionary reference appears in the description contained in the summaries of stringed fretted musical instruments, which include string guitars." The defendant's subsequent deduction appears justified: "This indicates that 'tuning pins,' and 'machine heads,' are different articles for tariff purposes."

The "Summaries of Trade and Tariff Information" provides further support for this distinction. "Summaries of Trade and Tariff Information," schedule 7, volume 3, page 108 (1968) states: "The principal parts of fretted stringed instruments are machine heads, shell picks or plectrums, and bridges." Tuning pins are described later as: "small pegs made from steel wire, which are driven into the frame of pianos and harps and used for attaching the strings. The pins are turned by means of a tuning wrench or 'hammer' to change the tension of the strings for the purpose of adjusting pitch." *Id.*, 168.

Thus, the weight of the evidence, as well as the legislative history, compels the sustaining of the Customs Service's classification of the merchandise under TSUS item 726.55.

The action is dismissed. Judgment will be entered accordingly.

(C.D. 4767)

WILD HEERBRUGG INSTRUMENTS, INC. *v.* UNITED STATES

Instruments

OPTICAL ELEMENTS—MOUNTINGS—PROVISION FOR PARTS

Phototubes exported from Switzerland in 1970 and 1971 and classified in liquidation upon entry at New York under TSUS item 708.89 as modified by T.D. 68–9 as optical appliances and instruments not provided for elsewhere in part 2 of TSUS schedule 7, *held*, properly classifiable as alternatively claimed by the importer under TSUS item 708.80 as modified by T.D. 68–9 as *mountings* for compound optical microscopes where the evidence establishes that the imported phototube which contains optical elements is mounted on a stereo-

microscope, a form of compound optical microscope, to facilitate the subsequent attachment of a camera on a portion of the tube for use in photomicrography, and possesses characteristics which identify it with the host microscope, and as such, is not a part of a camera, but is, if anything, a part of the microscope, for which part Congress has made specific provision in item 708.80 as a *mounting*.

Court No. 72-2-00278

Port of New York

[Judgment for plaintiff.]

(Decided September 14, 1978)

Barnes, Richardson & Colburn (*Richard C. King* of counsel) for the plaintiff.
Barbara Allen Babcock, Assistant Attorney General (*William F. Atkin*, trial attorney), for the defendant.

RICHARDSON, Judge: The merchandise in this case consists of phototubes which were manufactured in and exported from Switzerland in 1970 and 1971 and classified in liquidation upon entry at New York under TSUS item 708.89 as modified by T.D. 68-9 as optical appliances and instruments not provided for elsewhere in part 2 of TSUS schedule 7, at the duty rate of 31 or 27 per centum ad valorem, depending upon date of entry. It is claimed by the plaintiff-importer that the phototubes should be classified under TSUS item 722.34 as modified by T.D. 68-9 as parts of photographic cameras (other than motion-picture cameras) not containing a photographic lens valued over 50 percent of the value of the part, at the duty rate of 14 or 12 per centum ad valorem, depending upon date of entry. Alternatively, plaintiff claims that the phototubes should be classified under TSUS item 708.80 as modified by T.D. 68-9 as frames and mountings for compound optical microscopes, at the duty rate of 21 or 18 per centum ad valorem, depending upon date of entry. It was stipulated that none of the phototubes in issue contain photographic lenses.

Walter E. Gumpertz, product manager of plaintiff's microscope division, described the function of phototube 256 543 as being illustrative of the function of the phototubes in general. According to the witness this phototube is a beam splitter phototube which is inserted on top of the microscope tube support and underneath the binocular body of the microscope. The tube is capable of varying the relative amounts of light reaching the camera or eyepiece. The tube contains optical elements in the form of relay lenses and prisms. The function of the relay lenses is to compensate for the introduction of the tube into the microscope system. The function of the prisms is to divert the light beam in various ways.

Mr. Gumpertz assembled in court for demonstration purposes a Wild stereo microscope M5A comparable to that illustrated in exhibit

7, utilizing a phototube identical to phototube 256 530 with the exception of a flange having been substituted for a clamping ring for attaching the camera.

The witness assembled components for equipping the microscope for photomicrography by removing the binocular body and inserting the phototube in proper alignment. As inserted, the phototube (through the beam splitter in the left-hand path) picks up part of the image for the camera and, with the exception of a filter in the right-hand path to balance the light intensity of the images, leaves the right-hand path free.

After the binocular eyepiece is reinstalled on top of the phototube the image is identical but slightly enlarged because of the lengthening of the light path caused by the introduction of the tube.

An eyepiece is inserted in the phototube in order to project an image into the camera in the film plane when the microscope is in the proper focus position. The system is designed so that the image observed through the binocular and that created for the camera are in sharp focus at the same time.

The apparatus assembled in court approximates that illustrated at the top of page 2 of exhibit 8. However, it lacked the focusing telescope illustrated in exhibit 8 as marked by the witness. With the addition of the telescope and film the apparatus would have been prepared for taking photographs of the specimen. The equipment fitted on top of the phototube and eyepiece included an adaptor or flange, a shutter piece, camera lens, and film magazine. These parts, without a phototube, are sold as a camera package.

The purpose of the phototube whose operation was demonstrated is to remove 75 percent of the light or image from the left-hand observation path and project it into the attached camera via an eyepiece. This image is transmitted into the camera at infinity projection where a normal camera would be focused at various distances.

Any camera used with a phototube must utilize a lens, either its own or the eyepiece of the phototube, to form an image. Cameras can be utilized to take pictures of microscopic specimens without phototubes; but, according to Mr. Gumpertz, such operations would be highly impractical because of the trial and error method required. Mr. Gumpertz testified (R. 31):

> Q. Could both the microscopes which you refer to as compound optical microscopes and stereo microscopes both, in fact, be considered to be compound microscopes rather than simple microscopes?—A. Yes. They are both compound microscopes. Only to make a distinction, one of them is referred to as a stereo microscope.

Markus F. Meyenhofer, a research biologist for Merck & Co. who, among other things, has used one of plaintiff's stereomicroscopes

capable of photomicrography, testified that any kind of camera can be utilized with a phototube as long as it would fit the diameter of the phototube. He stated that it is advisable to utilize a single lens reflex camera because you can check the focus, whereas on other cameras it would be focused by trial and error.

The witness also testified that in his own laboratory the phototubes on plaintiff's microscopes are not removed even if the microscopes are not going to be utilized in photomicrography for a long period of time. He stated that the phototube is not inconvenient during the normal use of the microscope. Mr. Meyenhofer testified (R. 136–137):

> Q. What factor determines the length of the phototube?—A. The factor is determined by the composition of the lenses in the microscope.
>
> Q. If the phototube were too long what would be the result?—A. Well, your image wouldn't be in focus.
>
> Q. And if it were too short?—A. The same thing would happen.

In addition to use with cameras, it was also brought out in the testimonial evidence that the imported phototubes are capable of being used in connection with microscopes for projection purposes and for motion-picture purposes.

In support of its primary claim under item 722.34 plaintiff argues "when the phototube is attached to a camera to be used for photomicrography, the tube is necessary to the completion of the camera and its operation." (plaintiff's brief, p. 14) Defendant counters with the argument that "the phototubes are not an integral, constituent, or component part without which the cameras with which the phototubes are used could not function as cameras. Therefore, the imported phototubes cannot possibly be considered to be 'parts' of cameras for tariff purposes." (defendant's brief, pp. 22–23)

And in support of its alternative claim under item 708.80 plaintiff argues that "[t]he phototube does not substantially affect the image created by the microscope for visual inspection, with the exception of some increase in size because of the length and path of the image, and some darkening of the image caused by the diversion of a portion of the light for photographic purposes." (plaintiff's brief, p. 15) Defendant, agreeing in the alternative, adds, "the imported phototubes are attached to microscopes, contribute to the magnification of microscopes, are designed to complement the optical system of microscopes, and function basically to permit a compound optical microscope *without* a means for photographing or projecting the image to serve in an equivalent manner (once a camera is also used) as a compound optical microscope *with* means provided for photographing or projecting the image." (defendant's brief, p. 34)

In the court's opinion, the imported phototubes are properly classifiable as mountings for compound optical microscopes under TSUS item 708.80, and the court so holds. It is established in the record that the

stereomicroscopes to which the imported phototubes are attached are a form of *compound optical microscope*. And it is also established in the record that it is the *microscope* and not the camera which is *host* to the imported phototubes. For example, the configuration of the phototubes is influenced by optical characteristics of the microscope, the tube can be and sometimes is left in place on the microscope when the scope is employed solely for examination purposes, and even in the case of cameras designed by the manufacturer of the tubes in issue for use with those tubes, the tubes comprise no part of the camera package. Hence, if the tube is part of any instrument comprising a photomicroscopy system within the broadened concept of the term "part" (see *Gallagher & Ascher Company* v. *United States*, 52 CCPA 11, C.A.D. 849 (1964) [auxiliary heaters for automobiles]; *United States (Korlis Ltd., Party in Interest)* v. *The Westfield Manufacturing Company*, 49 CCPA 96, C.A.D. 803 (1962) [bicycle kickstands]; and *Trans Atlantic Company* v. *United States*, 48 CCPA 30, C.A.D. 758 (1960) [closer brackets for door frames] on optional equipment as parts of articles), it is part of the host microscope. Contrary to plaintiff's prime assertion, the tube is never "attached to a camera." In application the camera is mounted on or affixed to the tube or a portion thereof only *after* the tube has been mounted on the microscope. Consequently, in any sense of the meaning of the term "part," the tube cannot be deemed a part of a camera.

But even if it could reasonably be found that the imported phototubes are a "part" of a camera, the court would, nevertheless, be compelled, on the instant record, to find that the tube is a part for which Congress has otherwise made specific provision. There is no question in the court's mind but that these phototubes fall squarely within the ambit of the term "mountings" for compound optical microscopes under item 708.80. *Cf. United States* v. *International Forwarding Co.*, 9 Ct. Cust. Appls. 156, T.D. 37995 (1919), holding specially designed glass tubes for holding liquids for purposes of polariscopic examination to be "mountings" for optical instruments within the meaning of paragraph 93 of the Tariff Act of 1913. In that case the appellate court said (p. 159):

> * * * the word "mountings" when used in connection with optical instruments such as the microscope and polariscope is used in the sense of accessories, adjuncts, or parts thereof * * *.

Accord: See Explanatory Notes to the Brussels Nomenclature, 1955, section XVIII, heading 90.12.

And in view of the provision for mountings in item 708.80, resort to item 708.89 for classification of the phototubes in issue would be inappropriate since item 708.89 is at best residual.

For the reasons stated, plaintiff's alternative claim is sustained. Judgment will be entered herein accordingly.

(C.D. 4768)

HAROLD ELTON LADWIG v. UNITED STATES

Pig iron

An assessment of dumping duties on pig iron imported from Canada is claimed on the basis of the difference between the purchase price and constructed value. *Held* the assessment of dumping duties based on the difference between the purchase price and foreign value is correct.

Unless and until the challenging party introduces evidence to meet every material issue the value found by customs remains unrebutted. *Brooks Paper Company* v. *United States*, 40 CCPA 38, C.A.D. 495 (1972).

Evidence by shipper that there is no price structure by the selling company without further explanation or evidence of sales or offers by the other two manufacturers in the country of exportation is insufficient to eliminate foreign value under the Antidumping Act. *Nichols & Company, Inc.* v. *United States*, 59 CCPA 67, C.A.D. 1041 (1972).

Where there is evidence of sales to third countries and no quantities or values are adduced, which information may be pertinent under the Antidumping Act, there is a failure of proof. *J. H. Cottman & Co.* v. *United States*, 20 CCPA 344, T.D. 46114 (1932), *rev'd on other grounds*, 23 CCPA 378, T.D. 48292 (1936).

Court No. 75-6-01444

Port of Great Falls, Mont.

[Judgment for defendant.]

(Decided September 19, 1978)

Bronz & Farrell (*Edward J. Farrell* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Velta A. Melnbrencis*, trial attorney), for the defendant.

FORD, Judge: Plaintiff by this action contests the assessment of dumping duties on certain importations of pig iron imported from Canada. Upon liquidation dumping duties ranging from $8.26 to $11.42 per long-ton were assessed by customs. These duties were equal to the difference between the foreign market value as defined in section 205 of the Antidumping Act of 1921, as amended, 19 U.S.C. 164 (1970), and the purchase price as defined in section 203 of said act, 19 U.S.C. 162 (1970).

The parties agree there is no issue concerning the purchase price of $46 (U.S.) per long ton. Plaintiff, however, contends there is no foreign market value within the meaning of section 205 *supra*, and the absence of a foreign market value requires the use of constructed value as prescribed by section 206 of said act, as amended *supra*, 19 U.S.C. 165

(1970). Plaintiff alleges the use of constructed value in making the comparison with the purchase price should have been used in determining the existence and extent of any dumping margins. The constructed value, plaintiff contends, is $57.15 (Canadian) per long ton.

The pertinent statutory provisions read as follows:

STATUTES

The Antidumping Act of 1921, as amended:

Section 205, 19 U.S.C. 164 (1970):

Determination of foreign market value.

For the purposes of sections 160 to 171 of this title the foreign market value of imported merchandise shall be the price, at the time of exportation of such merchandise to the United States, at which such or similar merchandise is sold or, in the absence of sales, offered for sale in the principal markets of the country from which exported, in the usual wholesale quantities and in the ordinary course of trade for home consumption (or, if not so sold or offered for sale for home consumption, or if the Secretary determines that the quantity sold for home consumption is so small in relation to the quantity sold for exportation to countries other than the United States as to form an inadequate basis for comparison, then the price at which so sold or offered for sale for exportation to countries other than the United States), plus, when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition packed ready for shipment to the United States, except that in the case of merchandise purchased or agreed to be purchased by the person by whom or for whose account the merchandise is imported, prior to the time of exportation, the foreign market value shall be ascertained as of the date of such purchase or agreement to purchase. In the ascertainment of foreign market value for the purposes of sections 160 to 171 of this title no pretended sale or offer for sale, and no sale or offer for sale intended to establish a fictitious market, shall be taken into account. If such or similar merchandise is sold or, in the absence of sales, offered for sale through a sales agency or other organization related to the seller in any of the respects described in section 166 of this title, the prices at which such or similar merchandise is sold or, in the absence of sales, offered for sale by such sales agency or other organization may be used in determining the foreign market value.

Section 206, 19 U.S.C. 165 (1970):

Constructed value.

(a) Determination.

For the purposes of sections 160 to 171 of this title, the constructed value of imported merchandise shall be the sum of—

(1) the cost of materials (exclusive of any internal tax applicable in the country of exportation directly to such

materials or their disposition, but remitted or refunded upon the exportation of the article in the production of which such materials are used) and of fabrication or other processing of any kind employed in producing such or similar merchandise, at a time preceding the date of exportation of the merchandise under consideration which would ordinarily permit the production of that particular merchandise in the ordinary course of business;

(2) an amount for general expenses and profit equal to that usually reflected in sales of merchandise of the same general class or kind as the merchandise under consideration which are made by producers in the country of exportation, in the usual wholesale quantities and in the ordinary course of trade, except that (A) the amount for general expenses shall not be less than 10 per centum of the cost as defined in paragraph (1), and (B) the amount for profit shall not be less than 8 per centum of the sum of such general expenses and cost; and

(3) the cost of all containers and coverings of whatever nature, and all other expenses incidental to placing the merchandise under consideration in condition, packed ready for shipment to the United States.

* * * * * * *

Section 209, 19 U.S.C. 168 (1970):

Appraisal.

In the case of all imported merchandise, whether dutiable or free of duty, of a class or kind as to which the Secretary of the Treasury has made public a finding as provided in section 160 of this title, and as to which the appropriate customs officer has made no appraisement before such finding has been so made public, it shall be the duty of such customs officer, by all reasonable ways and means to ascertain, estimate, and appraise (any invoice or affidavit thereto or statement of constructed value to the contrary notwithstanding) and [*sic*] the foreign market value or the constructed value, as the case may be, the purchase price, and the exporter's sales price, and any other facts which the Secretary may deem necessary for the purposes of sections 160 to 171 of this title.

Section 212, 19 U.S.C. 170a (1970):

Definitions.

For the purposes of sections 160 to 171 of this title—

(1) The term "sold or, in the absence of sales, offered for sale" means sold or, in the absence of sales, offered—

(A) to all purchasers at wholesale, or

(B) in the ordinary course of trade to one or more selected purchasers at wholesale at a price which fairly reflects the market value of the merchandise,

without regard to restrictions as to the disposition or use of the merchandise by the purchaser except that, where such restrictions are found to affect the market value of the merchandise, adjustment shall be made therefor in calculating the price at which the merchandise is sold or offered for sale.

(2) The term "ordinary course of trade" means the conditions and practices which, for a reasonable time prior to the exportation of the merchandise under consideration, have been normal in the trade under consideration with respect to merchandise of the same class or kind as the merchandise under consideration.

(3) The term "such or similar merchandise" means merchandise in the first of the following categories in respect of which a determination for the purposes of sections 160 to 171 of this title can be satisfactorily made:

(A) The merchandise under consideration and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, the merchandise under consideration.

(B) Merchandise which is identical in physical characteristics with, and was produced by another person in the same country as, the merchandise under consideration.

(C) Merchandise (i) produced in the same country and by the same person as the merchandise under consideration, (ii) like the merchandise under consideration in component material or materials and in the purposes for which used, and (iii) approximately equal in commercial value to the merchandise under consideration.

(D) Merchandise which satisfies all the requirements of subdivision (C) except that it was produced by another person.

(E) Merchandise (i) produced in the same country and by the same person and of the same general class or kind as the merchandise under consideration, (ii) like the merchandise under consideration in the purposes for which used, and (iii) which the Secretary or his delegate determines may reasonably be compared for the purposes of sections 160 to 171 of this title with the merchandise under consideration.

(F) Merchandise which satisfies all the requirements of subdivision (E) except that it was produced by another person.

(4) The term "usual wholesale quantities", in any case in which the merchandise in respect of which value is being determined is sold in the market under consideration at different prices for different quantities, means the quantities in which such merchandise is there sold at the price or prices for one quantity in an aggregate volume which is greater than the aggregate volume sold at the price or prices for any other quantity.

Section 202, 19 U.S.C. 161 (1970):

SPECIAL DUMPING DUTY

Amount of duty to be collected; determination of foreign market value of goods.

(a) In the case of all imported merchandise, whether dutiable or free of duty, of a class or kind as to which the Secretary of the Treasury has made public a finding as provided for in section 160 of this title, entered, or withdrawn from warehouse, for consumption, not more than one hundred and twenty days before the question of dumping was raised by or presented to the Secretary or any person to whom authority under said section has been delegated, and as to which no appraisement has been made before such finding has been so made public, if the purchase price or the exporter's sales price is less than the foreign market value (or, in the absence of such value, then the constructed value) there shall be levied, collected and paid, in addition to any other duties imposed thereon by law, a special dumping duty in an amount equal to such difference.

* * * * * * *

The record consists of seven exhibits introduced on behalf of plaintiff, the receipt in evidence, without being marked, of the official papers, and a stipulation between counsel that there were only three producers of pig iron in Canada, i.e., Cominco, Ltd., Algoma Steel Corp., Ltd., and Quebec Iron and Titanium Corp. Plaintiff does not dispute the purchase price as it appears on the official court papers which was utilized by customs officials in determining the dumping duties.

It is plaintiff's position that "foreign market value" as set forth in section 205 of said act *supra* does not exist, and accordingly Customs should have utilized constructed value as set forth in section 206 *supra* in determining the applicability of dumping duties. In support of this position plaintiff's exhibit 1 was introduced into evidence. Said exhibit is an affidavit of Michael C. D. Hobbs, chairman and chief executive officer of Western Canada Steel, Ltd., a wholly owned subsidiary of Cominco, Ltd., the manufacturer of the pig iron involved herein. Mr. Hobbs' affidavit states that Western Canada Steel, Ltd., handled all sales of pig iron for its parent company until production was discontinued. Said company served as marketing agent for all sales in Canada and sold for export to the United States to Associated Metals & Minerals Corp. of New York (the actual importer herein—Harold Elton Ladwig—being a customhouse broker). Attached to said affidavit is a copy of a letter addressed to George Bronz, the deceased partner of counsel for plaintiff, from Mr. Hobbs of Western Canada Steel, as well as a list of home sales of pig iron. The letter indicates the termination of the production of pig iron was the result of an explosion and fire which destroyed their furnace,

and reconstruction was not contemplated. It was also indicated with respect to prices in the home market that:

> Our prices in the Canadian market have varied based upon a number of factors which we take into account, but there is no regular price structure in terms of class of customer, quantity or other factors which are specifically definable.
>
> All our sales are made on a delivered price basis, per long ton, and all money amounts are given in Canadian currency. No discounts are allowed. As shown in the tabulation, these prices include freight, and a standard $1 allowance per long ton for sales commission. The quality of the merchandise sold in the home market is the same as that sold for export to the United States. There is no financial relationship, directly or indirectly, between this company and any purchaser in Canada.

Based upon this information plaintiff contends, since there is no one price at which all could purchase the merchandise from Cominco in the home market, foreign value does not exist and therefore customs should have used constructed value to determine whether dumping duties are applicable.

Such evidence under the statutory provisions governing dumping duties and foreign value in particular as reflected in the statute is insufficient to overcome the presumption of correctness attaching to the action of customs. 28 U.S.C. 2635 (1970). Unless and until the challenging party introduces evidence to meet every material issue the value found by customs remains unrebutted. *Brooks Paper Company* v. *United States*, 40 CCPA 38, C.A.D. 495 (1952).

The statutory definition of "such or similar" contained in 19 U.S.C. 170a must be considered when ascertaining whether a foreign value exists. The parties have stipulated that there were two other producers of pig iron in Canada. There appears to be no dispute that pig iron of the same grade produced in Canada by the other producers is "like the merchandise under consideration in component material or materials and in the purpose for which used, and approximately equal in commercial value to the merchandise under consideration" as reflected in 19 U.S.C. 170a(3) (C) and (D). Additionally, plaintiff's exhibit 2 indicates sales to Japan by the shipper. The record is silent on sales to Japan, both as to quantity and price which may be pertinent in determining foreign value under the Antidumping Act. *J. H. Cottman & Co.* v. *United States*, 20 CCPA 344, T.D. 46114 (1932), *rev'd on other grounds*, 23 CCPA 378, T.D. 48296 (1936). Varying prices without an explanation of the statement that "there is no regular price structure" is insufficient to establish there is no one price at which all could purchase. As a matter of fact, the sales listed in exhibit 1 indicate 28 sales made at the appraised prices or approximately 32 percent of said sales. The record is also silent on the question of sales or offers by the two other producing companies. *Nichols & Company*,

Inc. v. *United States*, 59 CCPA 67, C.A.D. 1041 (1972). No attempt was made to ascertain this information. Letters were directed to the other two companies only with respect to general expenses and profits. See exhibits 3–6.

In view of the foregoing it is unnecessary to consider whether plaintiff has adduced sufficient evidence to establish constructed value. The appraised values not having been overcome are sustained. The dumping duties have therefore been properly assessed.

Judgment will be entered accordingly.

(C.D. 4769)

H. Rosenthal Co. *v.* United States

Parkas

Quilted snorkel parkas classified as other men's or boys' wearing apparel under item 380.84 of the Tariff Schedules of the United States *held* properly subject to classification under the provisions of item 376.56 of said tariff schedules *supra* as garments designed for rainwear, etc., as claimed.

Headnote 2(a) in schedule 3, part 4, subpart C, which defines the term "coated" relates to a coating which visibly and significantly affects the surface or surfaces of the material. Such definition does not require the coating to be visible by ocular inspection. The only requirement is that the surface or surfaces of the material are visibly and substantially affected.

Court No. 75-1-00214
Port of Minneapolis

[Judgment for plaintiff.]

(Decided September 27, 1978)

O'Connor & Hannan (*Michael Patrick George*) for the plaintiff.
Barbara Allen Babcock, Assistant Attorney General (*Alan L. Langus* and *Sidney H. Kuflik*, trial attorneys), for the defendant.

Ford, Judge: Plaintiff by this action is contesting the classification and consequent assessment of duty on men's and boys' quilted snorkel parkas. These items were classified by Customs as "other men's or boys' wearing apparel, not ornamented" under item 380.84 of the Tariff Schedules of the United States and assessed with duty at the rate of 25 cents per pound plus 27.5 percent ad valorem.

The merchandise is claimed to be subject to duty at 16.5 percent ad valorem under the provisions for garments designed for rainwear which are coated or filled as set forth in item 376.56 of the Tariff Schedules of the United States.

The pertinent statutory provisions of the Tariff Schedules of the United States read as follows:

Classified under:

Schedule 3, Part 6, Subpart F

Other men's or boys' wearing apparel, not ornamented:

* * * * * * *

Of man-made fibers:

* * * * * * *

380.84	Not Knit	25¢ per lb. + 27.5% ad val.

Claimed under:

Schedule 3, Part 4, Subpart C, Headnote 2(a)

2. For the purposes of the tariff schedules—

(a) the term 'coated or filled", as used with reference to textile fabrics and other textile articles, means that any such fabric or other article has been coated or filled (whether or not impregnated) with gums, starches, pastes, clays, plastics materials, rubber, flock, or other substances, so as to visibly and significantly affect the surface or surfaces thereof otherwise than by change in color, whether or not the color has been changed thereby;

Schedule 3, Part 6, Subpart D

Garments designed for rainwear, hunting, fishing, or similar uses, wholly or almost wholly of fabrics which are coated or filled or laminated, with rubber or plastics, which (after applying headnote 5 of schedule 3) are regarded as textile materials:

* * * * * * *

376.56	Other	16.5% ad val.

The record consists of the testimony of six witnesses (one being a deposition of Mr. Odean A. Olsen, an import specialist), and the receipt in evidence of 19 exhibits on behalf of plaintiff. Defendant presented the testimony of two witnesses and there were received on its behalf six exhibits.

The evidence adduced and the argument presented by defendant that the coating applied to the fabric, of which the parkas are made, must be visible to the naked eye and not with the use of a microscope, is misplaced. Based upon the testimony of Dr. Rommel, the director of the Chicago regional laboratory, it would appear that such is Customs' interpretation of the tariff term "coated" as indicated by the following testimony.

[MR. GEORGE] Q. Therefore, would you say that, putting that film on that fabric had a visible effect on the fabric?
[DR. ROMMEL] A. Yes, it does have a visible effect, but that is not what the headnote has been interpreted to be meant.

There appears to be no doubt that the imported merchandise is waterproof and has a coating, as indicated in the customs' laboratory report, plaintiff's exhibit 19, and would fall within the purview of item 376.56 *supra* if coated or filled within the definition contained in schedule 3, part 4, subpart C, headnote 2(a). The language of said headnote does not relate to whether the coating or filling is visible either to the naked eye or with the assistance of a microscope, but whether said coating or filling visibly and significantly affects the surface or surfaces. Accordingly, it matters not that the coating or filling cannot be seen by ocular inspection. The statutory requisites relate to the effect on the surface or surfaces and whether it is visible and significant.

In the case of *Kaplan Products & Textiles, Inc.* v. *United States*, 70 Cust. Ct. 166, C.D. 4425 (1973), certain cotton suede cloth which had been waterproofed was held not to be coated within the meaning of headnote 2(a) of schedule 3, part 4, subpart C of the tariff schedules, *supra*. The court in arriving at its conclusion made the following observation:

> While the hydrophobic effect of the finish is readily apparent when water is sprinkled on the treated suede fabric, the finish itself is transparent. As plaintiff's expert witness explained (R. 41–42):
>
> > * * * In the instance of the water repellent fabric, you cannot see it with the naked eye; you can only see the effect of it. In fact, you cannot see it with a visual microscope. The coating is that finite. It is almost monomolecular in consistence on the surface of the cotton fiber.
>
> Thus, the water-repellent finish used on the fabric in issue leaves the material unchanged in appearance from cotton suede fabric which has not been so treated.
>
> * * * * * * *
>
> As used with reference to textile fabrics, headnote 2(a) specifies that the "term *'coated or filled'* * * * means that any such fabric * * * has been coated or filled * * * so as to *visibly* and *significantly affect the surface or surfaces* thereof otherwise than by change in color whether or not the color has been changed thereby."
>
> As we construe this headnote, whether or not a textile fabric comes within its purview does not depend on the characteristics of the fabric with coating or on its intended use. Thus, the fact that the coating may render the cloth rot proof, vermin proof, water repellent or waterproof is immaterial. Rather, under the criteria set out in the definition, the fabric must be coated with a substance which will *"visibly"* affect the surface of the cloth.

In short, if the surface has not been "visibly" affected, the textile is not "coated".

It is quite true that the water-repellent finish has significantly affected the surfaces of the imported cotton suede fibers by making them hydrophobic; however, it is manifest from the testimonial evidence and exhibits that the finish has not *visibly* affected the surface of the fabric—indeed, the "coating" is undetectable not only to the naked eye but also under the microscope. In other words, the fact that the finish creates a water-repellent surface is entirely immaterial in the absence of any visible affect thereon. Accordingly, the imported cloth is not "coated" as that term is defined in headnote 2(a). [Emphasis quoted.]

The court is in agreement with the above interpretation of the headnote. However, the *Kaplan* decision is not controlling in the instant case. In the case at bar Dr. Rommel, called on behalf of defendant, testified the effect of the coating is visible to the naked eye. Mr. Lavoie, an import specialist, also called on behalf of defendant, testified that exhibit 2 felt stiffer. The district director, Ms. Maki, called on behalf of plaintiff while admittedly not a classification expert, testified that exhibit 2 seemed stiffer than exhibit 3. Mr. Rosenthal also testified that exhibit 2 was stiffer, heavier, and did not have frayed edges. Mr. Biedler testified that exhibit 2 was stiffer and did not have ragged edges. Defendant contends stiffer is not a visible sense, but one of feel. The court has examined exhibits 2 and 3 which are representative of the material involved. Exhibits 2 and 3 are cut from the same bolt of material, but exhibit 2 has been coated and exhibit 3 has not. The appearance of stiffness, visibly and not by feel, is quite apparent to the court. Based upon the record and the court's own examination of the material used in the manufacture of the imported parkas, the court is of the opinion that said merchandise is coated within the purview of the controlling headnote, and as such properly subject to classification under item 376.56 *supra*, as claimed.

In view of the foregoing the issue of equitable estoppel raised by plaintiff is moot. Judgment will be entered accordingly.

(C.D. 4770)

DR. EARL SASS *v.* UNITED STATES

Wood products

I. *Export Value.*—Pro forma invoices of the merchandise in question prepared and submitted by plaintiff alone are insufficient to establish such value.

II. *Export Value.*—Sales of similar merchandise in the domestic market of the country of exportation are not determinative of export value.

III. *Export Value.*—The evidence as to the sales price of the merchandise in question is neither sufficient to overcome the presumption of correctness attaching to the Government's appraisement nor sufficient to meet every requisite element of such value in strict compliance with the statute (19 U.S.C. 1401a(b)).

Court Nos. R67/18018, etc.

Port of San Francisco

[Judgment for defendant.]

(Decided October 11, 1978)

Glad, Tuttle & White (*Steven W. Baker* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Velta A. Melnbrencis* and *Madeline B. Cohen*, trial attorneys), for the defendant.

BOE, Judge: At the trial of the above-entitled action five additional causes of action in which the plaintiff and the defendant herein are also parties, represented by Court Nos. R67/18019, R67/18020, R67/18021, R67/18022, and R67/18023, were consolidated therewith.

The merchandise involved in the instant action consisting of carved wood items including bowls, plates, utensils, trays, statues, together with straw hats, sisal rugs, beads, and other miscellaneous articles was purchased by the plaintiff in Haiti and exported therefrom between January 14, 1964, and August 10, 1964. The merchandise was entered at the port of San Francisco in 1964 upon pro forma invoices prepared and submitted by the plaintiff and containing the unit purchase price which allegedly had been paid for the respective items of merchandise in Haiti.

The merchandise was appraised by customs officials on the basis of export value at its invoiced unit value plus percentage increases designated in red on the entry papers and ranging from 100 to 700 percent, plus a prorated part of the items marked "X" for packing charges.

No dispute exists with respect to the appraisement of the merchandise in question at its export value pursuant to section 402(b) of the Tariff Act of 1930, as amended by the Customs Simplification Act of 1956, providing:

> (b) EXPORT VALUE. For the purposes of this section, the export value of imported merchandise shall be the price, at the time of exportation to the United States of the merchandise undergoing appraisement, at which such or similar merchandise is freely sold or, in the absence of sales, offered for sale in the principal markets of the country of exportation, in the usual wholesale

> quantities and in the ordinary course of trade, for exportation to the United States, plus, when not included in such price, the cost of all containers and coverings of whatever nature and all other expenses incidental to placing the merchandise in condition, packed ready for shipment to the United States. [19 U.S.C. 1401a(b).]

The plaintiff, however, contends that the unit purchase prices and packing charges indicated on the pro forma invoices submitted by him constitute the export value of the merchandise in question.

The facts relevant to the plaintiff's asserted claim disclose that while the owner-operator of certain book stores in San Francisco, Calif., he visited Port-au-Prince, Haiti, in December 1963, as a tourist and purchased miscellaneous woodenware articles of a total valuation of about $50. The popular reception received by these articles in San Francisco caused the plaintiff to engage in the business of importing assorted articles of merchandise from Haiti for sale in his stores. The first shipments imported by plaintiff in 1964 for commercial sale comprise the six entries included in this consolidated action. The plaintiff continued to visit Haiti for about 2 months of each year through 1968 for the purpose of buying merchandise for subsequent importation and sale in the United States. Except for beads which were purchased by his close friend and associate, Margaret Hale, all of the merchandise in question was purchased by the plaintiff and packed by him or under his supervision for shipment to the United States.

From the evidence submitted, it appears that all of the merchandise purchased by the plaintiff was carved, molded, woven or made, as the case might be, by native laborers who, in so doing, worked together in groups or communes. The selection and purchase of a majority of the merchandise was made by the plaintiff in the iron market, a common market place at which produce, fruits, poultry as well as merchandise similar to that imported by plaintiff were displayed and sold by vendors either individually or in groups from their respective partitions or stalls. Additional purchases of merchandise were made by the plaintiff from merchant-vendors outside of the airport as well as from merchant-vendors who solicited him at a warehouse which he had rented. The testimony of the plaintiff represented the merchandise purchased by him to be of an inferior quality to articles of merchandise of similar identity and character sold in various, select locations in Haiti. In illustration of the quality of the imported articles in question, the plaintiff testified that such merchandise included items of woodenware which were infested with termites or which subsequently cracked because of green wood, sisal rugs and mats whose colors would fade, and beads whose strings

would break. Plaintiff's collective exhibit 1, consisting of 39 articles, was represented to be illustrative only of the imported merchandise in question and of the defects found or occurring to the merchandise imported by the plaintiff during the period 1964–68. None of the items comprising plaintiff's collective exhibit 1 could be identified, however, by the plaintiff as having been among the articles contained in the six entries comprising the subject matter of the instant consolidated action.

No prices were listed or displayed at any time or at any place with respect to the merchandise in question. Each purchase by the plaintiff was made after the vendor orally quoted a price per unit or per dozen lots. Inability to understand or speak the language of the other prevented the plaintiff and the native vendors from engaging in a conversation more extensive than a quotation of price. Although the price for the merchandise in question purchased by the plaintiff in the iron market was the same price offered to and paid by tourists who may have then been present, the plaintiff was unaware of the price paid for any other purchases for similar merchandise either in individual units or wholesale lots for exportation to the United States during the period of time in question.

The appraised valuation of the merchandise in question in the instant action by the customs officials bears a statutory presumption of correctness having evidentiary weight in and of itself. Upon the plaintiff, therefore, rests the dual burden of establishing that the determination of the customs officials was erroneous and that the dutiable value claimed by him is proper and correct. *United States* v. *New York Merchandise Co., Inc.*, 58 CCPA 53, C.A.D. 1004, 435 F. 2d 1315 (1970); *Novelty Import Co., Inc.* v. *United States*, 53 CCPA 28, C.A.D. 872 (1966). Our appellate court has stated in the case of *Kobe Import Co.* v. *United States*, 42 CCPA 194, at 198, C.A.D. 593 (1955):

> However erroneous the appraiser's action may have been in valuing the merchandise, it was incumbent upon appellant seeking to prove the correctness of a different statutory export value to meet every material issue in the case, and hence establish every element of that value in strict compliance with the dictates of section 402(d), *supra*. Failing to sustain this burden of proof, the value fixed by the appraiser remains in full force and effect.

In contesting the correctness of the appraised valuation determined by the customs officials and in the effort to establish his asserted dutiable value, the plaintiff offered the pro forma invoices prepared by him containing the price of merchandise which he allegedly paid. The court files, which have been made a part of this record, include miscellaneous receipts purportedly indicating an acknowledgment of a sum of money designated thereon. No effort, however, has been

made to establish any relationship between the individual receipts and the invoice prices, the merchandise enumerated on said invoices or the vendors of the merchandise in question. The invoices prepared by the plaintiff do not alone supply the statutory requisites necessary to establish value. As our appellate court has stated in the case of *Kobe Import Co.* v. *United States*, *supra*, at 199:

> * * * it is nevertheless clear that an invoice cannot of itself establish the statutory elements necessary to constitute export value. The price stated in such invoice may or may not be in conformity with that valuation contemplated by the statute. It is a matter of proof and not of suspicion. * * *

From the remaining evidence submitted by the plaintiff, therefore, it is necessary to consider whether the determination of the customs officials has been proved erroneous and whether, as our appellate court has stated, every element of export value in strict compliance with the requirements of the statute has in turn been met.

The plaintiff seeks to establish that the merchandise in question was of inferior quality to other merchandise sold in Haiti at a higher price and that in normal practice sales of such merchandise occurred in public markets such as the iron market and/or the plaintiff's warehouse. Relying on the rationale enunciated in the case of *Chr. Bjelland & Co., Inc.*, v. *United States*, 52 CCPA 38, C.A.D. 855 (1965), the plaintiff urges that only the sales of the merchandise at the iron market and at his warehouse should be considered within the purview of the statutory requirement "in the ordinary course of trade" and that, accordingly, sales of better quality merchandise, although of similar identity, made at other business establishments should not be used as a comparison.[1] In an apparent effort to place himself in the position of the principal importer from Haiti during the period of time in question, the plaintiff introduced in evidence exhibit 8 consisting of a documented chart in which the importation of only woodenware articles by the plaintiff in 1964 is compared to the total amount of importations of such woodenware items from Haiti in said year. Neither exhibit 8 nor other evidence submitted serves to justify the application of the *Chr. Bjelland* rationale.

An examination of exhibit 8 reveals that the plaintiff could not be considered a single major importer even with respect to the restricted character of the articles compared. It further will be noted that no effort was made to include in such comparative statistics additional merchandise imported by the plaintiff consisting of rugs, hats, pictures,

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[1] In the *Bjelland* case, our appellate court carefully pointed out that the only class or kind of merchandise involved therein were two kinds of fish (sardines and kipper snacks) of which the appellant therein was the single largest importer. Accordingly, a determination of export value was held to be properly restricted solely to such sales and not the sales of all fish.

drums, beads, and other miscellaneous articles. Nor were the sales of merchandise in question in the instant action restricted to a limited number of items. The evidence submitted indicates that a wide variety of articles were purchased in multiple and differing assortments, in large numbers or quantities, as in the case of beads, as well as in job lots and in mixed groups. No evidence, however, has been submitted to establish any price at which merchandise of alleged inferior quality, whether sold or offered for sale at a public market or elsewhere, and whether in large quantities, in job lots and mixed groups and assortments " * * * [was] freely sold or, in the absence of sales, offered for sale in the principal markets of the country of exportation, in the usual wholesale quantities and in the ordinary course of trade, for exportation to the United States, * * * " as required by the statute.[2] The only evidence remotely pertaining to the uniformity of price for merchandise freely offered for sale to and paid by other purchasers for articles similar to the merchandise purchased by the plaintiff related to the purchases made by tourists at the iron market. Such purchases by tourists were restricted to individual articles and did not consist of wholesale or job lot quantities. Nor were such sales to tourists made for the purpose of exportation to the United States. Sales in the domestic market of the exporting country cannot be used in the determination of export value. *J. L. Wood* v. *United States*, 62 CCPA 25, C.A.D. 1139, 505 F.2d 1400 (1974).

The admissions of the plaintiff might be deemed as a personal acknowledgment of the inability to meet the essential elements required by the statute to establish export value. He acknowledged that he was not aware of the merchandise which may have been sold to other persons nor the price paid therefor. He did not recall any wholesalers purchasing merchandise, however, subsequently, his testimony referred to a wholesaler who had not made purchases in the manner that the plaintiff's purchases were made.[3] In sum, the record reveals only the amount the plaintiff allegedly paid for the merchandise in question and is completely silent as to the amount other importers paid for similar merchandise or for the merchandise purportedly of a higher quality. The requirements of proof of export value are exact and demanding. The statutory elements necessary to establish such value cannot be supplanted by judicial conjecture.

It appears from the court files relating to the entry of the merchandise in question that the actual content of the boxes in which the merchandise in question was packed was in variance with and contained articles in excess of the articles enumerated on the packing lists sub-

[2] 19 U.S.C. 1401a(b).
[3] Transcript, p. 67.

mitted by the plaintiff. A reconstructed invoice of the actual articles of merchandise imported was required to be performed by the customs officials. In so doing, it can well be recognized that the appraisement of the merchandise in question necessarily consisted of a more exacting examination than might otherwise have occurred. In view of the foregoing to discard the considered determination of the customs officials in the appraisement of the specific articles of merchandise at the time of its importation for the questionable representations of the plaintiff as to the amount, quality and condition of the merchandise made at the trial of this action would do violence to the presumption of correctness with which the appraisement of the merchandise in question is clothed.

More than cursory notice should be given to the fact that a period of 14 years has elapsed between the entry of the merchandise in question and the trial of this consolidated cause of action. Whether a more prompt presentation of this case would have afforded plaintiff's counsel the opportunity to submit more clear, convincing and material evidence in support of plaintiff's claim might be conjectural. Needless to say, however, the prolonged passage of time has neither served to aid the plaintiff in the burden of proof incumbent upon him, nor to aid this court in assessing the credibility of the witnesses and the testimony presented herein.

From the testimony and the record submitted, this court, therefore, concludes that the plaintiff neither has established that the appraised valuation by the customs official was erroneous, nor that the dutiable value of the merchandise in question asserted by him is proper and correct as the export value thereof. The cause of action is dismissed.

Let judgment be entered accordingly.

(C.D. 4771)

MITSUBISHI INTERNATIONAL CORPORATION *v.* UNITED STATES

On defendant's motion for rehearing

Court No. 77-7-01146

Port of Anchorage

[Motion granted; action dismissed.]

(Dated October 11, 1978)

Bogle & Gates (*David M. Salentine* and *Thomas J. McKey* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Sidney N. Weiss* and *Madeline B. Cohen*, trial attorneys), for the defendant.

ORDER

WATSON, J.

Upon reading and filing defendant's motion for rehearing and reconsideration, plaintiff's response thereto, and all other papers and proceedings had hereunder, it is hereby

ORDERED that this court's opinion and order of July 25, 1978 (C.R.D. 78–9) be, and hereby is, vacated; and it is further

ORDERED, ADJUDGED, AND DECREED that defendant's motion for rehearing and reconsideration be, and hereby is granted, and that the above-captioned action be, and hereby is, dismissed for lack of jurisdiction.

(C.D. 4772)

EXXON CORPORATION (SUCCESSOR TO HUMBLE OIL & REFINING COMPANY) and CHEVRON OIL COMPANY v. UNITED STATES

Naphtha—Motor fuel

A petroleum derivative known as motor alkylate classified as motor fuel under item 475.25 of the Tariff Schedules of the United States and assessed with duty at the rate of 1.25¢ per gallon *held* properly subject to classification as naphtha under item 475.35 of the Tariff Schedules of the United States and as such dutiable at 0.25¢ per gallon.

The presumption of correctness attaching to the classification is rebutted by the failure of the customs laboratory to follow the prescribed tests set forth in the standards for classification of motor fuel contained in T.D. 66–23(13). *Aluminum Company of America* v. *United States*, 60 CCPA 148, C.A.D. 1102, 477 F. 2d 1396 (1973); *Consolidated Cork Corp.* v. *United States*, 54 Cust. Ct. 83, C.D. 2512 (1965).

Court No. 74–5–01359

Port of New York

[Judgment for plaintiffs.]

(Decided October 16, 1978)

Donohue and Donohue (*Joseph F. Donohue, Sr., Joseph F. Donohue, Jr.* and *William J. Phelan* of counsel) for the plaintiffs.

Barbara Allen Babcock, Assistant Attorney General (*Sidney N. Weiss*, trial attorney), for the defendant.

FORD, Judge: This action involves two entries of a petroleum derivative known as motor alkylate, a naphtha used as a blending stock in the manufacture of certain motor fuel. The merchandise was classified by Customs for duty purposes as motor fuel under item 475.25, Tariff Schedules of the United States, and assessed with duty at the rate of 1.25¢ per gallon.

Plaintiffs contend, due to contamination in the discharge line at the Bayway, N.J., refinery, the results of Customs tests do not reflect the properties of the merchandise imported. The merchandise imported, plaintiffs allege, is naphtha and as such is subject to classification under item 475.35 and dutiable at 0.25¢ per gallon.

The pertinent statutory provisions involved read as follows:

GENERAL HEADNOTES AND RULES OF INTERPRETATION

* * * * * * *

10. *General Interpretative Rules.* For the purposes of these schedules—

* * * * * * *

(e) in the absense of special language or context which otherwise requires—

(i) a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of articles of that class or kind to which the imported articles belong, and the controlling use is the chief use, i.e., the use which exceeds all other uses (if any) combined;

* * * * * * *

Schedule 4, part 10 headnote:

* * * * * * *

2. For the purposes of this part—

* * * * * * *

(b) "*Motor fuel*" (item 475.25) is any product derived primarily from petroleum, shale, or natural gas, whether or not containing additives, which is chiefly used as a fuel in internal-combustion or other engines.

* * * * * * *

475.25	Motor fuel	1.25¢ per gal.
*	* * * * * *	
475.35	Naphthas, derived from petroleum, shale oil, natural gas, or combinations thereof (except motor fuel)	0.25¢ per gal.

The record consists of the testimony of ten witnesses, five called on behalf of plaintiffs and five by defendant. In addition, plaintiffs

introduced 27 exhibits and defendant 13 exhibits. In effect, the record establishes plaintiffs ordered motor alkylate C–74. The designation C–74 was Exxon specifications. (Plaintiffs' exhibit 3.) Samples were taken before shipment, analyzed and found to be within the specifications except as to the 90-percent distillation point and the lead content. Exxon notified the shipper the merchandise was acceptable. The merchandise was tested on four separate occasions in Aruba. These tests were made prior to loading, during the loading, on board the tanker, and after completion of the loading. Plaintiffs' exhibit 1 contains in column marked C–74 the results of the tests made on the merchandise in tank 355 from which the merchandise was drawn. The column marked "ship" indicates the results of the tests of the merchandise on the ship.

Evidence was also adduced by the testimony of George Vlandis, an employee of the shipping company. It was established the vessel was "dry" and various documents indicated a normal voyage with no leakage, etc. which may have caused contamination.

Upon arrival the merchandise was discharged into three tanks. The line wash to clear the discharge line was discharged into shore tank 1117 and the cargo was discharged into shore tanks 233 and 1113. Approximately half was discharged into tank 233 which contained a "heel" of alkylate (merchandise in the tank from a previous importation). Tank 233 contained 596,799 gallons to which was added from the instant importation 2,254,576 gallons. Tank 1113 contained 3,307,994 gallons as a heel to which was added from the importation 2,202,803 gallons.

According to witness Peterson the test results of tank 233 (plaintiff's exhibit 21), which contained the imported merchandise and the heel in the tank, was consistent with the results of the tests in Aruba (plaintiffs' exhibit 1).

Defendant's tests, represented by plaintiffs' exhibits 22 and 23 found the API gravity at 60° F. and the 10-, 50-, and 90-percent distillation to be within the requirements of ASTM specifications for motor fuel as set forth in T.D. 66–23(13). There is evidence to the effect that the results found by plaintiffs in exhibit 21 theoretically could not have occurred with the mixture of the heel and the imported product.

The standards for motor fuel contained in T.D. 66–23(13) provide as follows:

> T.D. 66–23(13) *Motor fuel. Standards for classification of naphtha-type and kerosene-type materials as motor fuel.*—The following table captioned "CRITICAL PROPERTIES OF MATERIALS CHIEFLY USED AS MOTOR FUELS IN INTERNAL COMBUSTION OR OTHER ENGINES IN THE UNITED STATES" is published for the

guidance of customs officers in identifying petroleum materials which are chiefly used as motor fuels as defined in *Schedule 4, Part 10, Headnote 2(b)*, and classifiable under the provision for Motor fuel, in *item 475.25*, TSUS. Classification of an imported petroleum product as a Motor fuel under *item 475.25*, TSUS, would be indicated if for each of the properties listed in the table for a given type of motor fuel, the corresponding properties of the imported product fall within the ranges set out in the table for that type of motor fuel. The standards for motor fuels contained herein supersede any standards previously published by the Bureau for petroleum materials chiefly used as motor fuels. These standards in the table will be reviewed periodically and revised, when appropriate, to reflect any change in chief use of such materials.

CRITICAL PROPERTIES OF MATERIALS CHIEFLY USED AS MOTOR FUELS IN INTERNAL COMBUSTION OR OTHER ENGINES IN THE UNITED STATES

(For Use in Classifying Imported Naphtha-Type or Kerosene-Type Materials)

		Aviation		
			Turbine fuels	
	Automotive Gasoline, all grades	Gasoline, all grades	Military JP–4: Commercial jet B	Military JP–4: Commercial jet A & A1
	Minimum to maximum range limits			
Gravity, °API, ASTM D–287	56. 3–67. 7	64. 0–76. 2	49. 1–56. 5	36. 5–46. 0
Distillation, ASTM D–86:				
°F at 10% D+L	103–135	138–165	180–246	352–394
°F at 50%	185–233	174–220	232–360	392–432
°F at 90%	301–358	213–260	331–468	424–495
Reid Vapor Pressure, psi ASTM D–323	7. 5–13. 2	5. 8–7. 0	2. 0–2. 9	0. 0–0. 5
Octane (Research) ASTM D0908	83. 1–103. 3	81–105		
Octane (Motor) ASTM D–357	79. 5–99. 6	81–105		
Freeze Point,°F, ASTM D–1477			(−110)–(−76)	(−69)–(−48)
Olefins, Volume %, ASTM D–1319			0–2. 9	0. 0–4. 5
Appearance: Clear and bright				

Bureau letter dated January 19, 1966. (418.114).

It is noted that classification as motor fuel requires "each of the properties listed" for such finding. The testimony of the customs

chemist and the results set forth in plaintiffs' exhibit 23 indicate only 4 of the 10 properties in T.D. 66–23(13), i.e., API gravity at 60° F., the 10-,50-, and 90-percent distillation. Mr. Palm, the government chemist who performed the tests, admitted that these four properties alone are insufficient to arrive at the conclusion said merchandise is aviation motor fuel. Accordingly, defendant's laboratory tests do not establish the imported merchandise to be motor fuel and therefore any presumption of correctness which may have attached to said classification is rebutted. *Aluminum Company of America* v. *United States*, 60 CCPA 148, C.A.D. 1102, 477 F. 2d 1396 (1973); *Consolidated Cork Corp.* v. *United States*, 54 Cust. Ct. 83, C.D. 2512 (1965). In *Consolidated Cork*, *supra*, the court made the following observation:

> It is well settled that the methods of weighing, measuring, and testing merchandise used by customs officers and the results obtained are presumed to be correct. *United States* v. *Gage Bros.*, 1 Ct. Cust. Appls. 439, T.D. 31503; *United States* v. *Lozano Son & Co.*, 6 Ct. Cust Appls. 281, T.D. 35506; *Draper & Co., Inc.* v. *United States*, 28 Cust. Ct. 136, C.D. 1400. However, this presumption may be rebutted by showing that such methods or results are erroneous. *Sears, Roebuck & Co.* v. *United States*, 3 Ct. Cust. Appls. 447, T.D. 33035; *Gertzen & Co.* v. *United States*, 12 Ct. Cust. Appls. 499, T.D. 40697; *Pastene & Co., Inc.* v. *United States*, 34 Cust. Ct. 52, C.D. 1677. Furthermore, the presumption does not have evidentiary value and may not be weighed against relevant and material proof offered by the plaintiffs. If a *prima facie* case is made out, the presumption is destroyed and the Government has the burden of going forward with the evidence. *United States* v. *Edson Keith & Co.*, 5 Ct. Cust. Appls. 82, T.D. 34128; *Hawley & Letzerich et al.* v. *United States*, 19 CCPA 47, T.D. 44893; *United States* v. *Magnus, Mabee & Reynard, Inc.*, 39 CCPA 1, C.A.D. 455; *James Bute Company* v. *United States*, 33 Cust. Ct. 130, C.D. 1644. [54 Cust. Ct. at 85.]

Defendant, not having complied with its own directives, T.D. 66–23(13) must affirmatively establish the alkylate to be motor fuel once plaintiffs have established a prima facie case.

Whether or not, as contended by plaintiffs, the merchandise was contaminated by the failure to wash out the cross-over pipe is immaterial and only an assumption. The preponderance of credible evidence, four separate tests in Aruba and the tests conducted at Bayway, leads to the conclusion that the imported merchandise was not within the standards required by both ASTM and Customs for motor fuel. The record does establish the involved alkylate to be a blending agent used in the manufacture of motor fuel and is therefore not motor fuel itself. All other matters having been considered, the court finds plaintiffs have established the correct classification to be under item 475.35 TSUS, as claimed.

Judgment will be entered accordingly.

(C.D. 4773)

INTERNATIONAL SEAWAY TRADING CORP. *v.* UNITED STATES

Footwear—Rubber

Imported footwear invoiced as basketball high shoes was classified by the Government under item 700.60, TSUS, as "[f]ootwear * * * which is over 50 percent by weight of rubber or plastics * * *" and assessed with duty at the rate of 20 percent ad valorem. Plaintiff claims that the merchandise should be classified under item 700.70, TSUS, as "[f]ootwear * * * [w]ith soles of material other than leather: [w]ith uppers of vegetable fibers," with duty assessable at the rate of 15 percent ad valorem. *Held:* Plaintiff's claim for classification under item 700.70 sustained. *International Seaway Trading Corp.* v. *United States*, 61 CCPA 20, C.A.D. 1112, 488 F. 2d 544 (1973) followed.

Court No. 68/2743

Port of New York

[Judgment for plaintiff.]

(Decided October 30, 1978)

Sharretts, Paley, Carter & Blauvelt (*Patrick D. Gill* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Herbert P. Larsen*, trial attorney), for the defendant.

Lamb & Lerch (*Richard J. Kaplan* of counsel), amicus curiae.

MALETZ, Judge: This case is a sequel to *International Seaway Trading Corp.* v. *United States*, 61 CCPA 20, C.A.D. 1112, 488 F. 2d 544 (1973), *rev'g* 69 Cust. Ct. 58, C.D. 4375, 349 F. Supp. 1019 (1972). The record in that case has been incorporated into the record here.

The imported merchandise in the present case consists of footwear invoiced as basketball high shoes which was imported from Hong Kong and is the same in all material respects as the footwear in the incorporated case. And as in the incorporated case, the imported footwear was classified by the Government under item 700.60 of the Tariff Schedules of the United States (TSUS) as "[f]ootwear * * * which is over 50 percent by weight of rubber or plastics * * *," and assessed with duty at the rate of 20 percent ad valorem. Plaintiff claims here—as it did successfully in the incorporated case—that the merchandise should be classified under item 700.70, TSUS, as "[f]ootwear * * * [w]ith soles of material other than leather: [w]ith uppers of vegetable fibers," with duty assessable at the rate of 15 percent ad valorem.[1]

[1] The Customs Service has limited the decision of the Court of Customs and Patent Appeals in the incorporated case to the merchandise covered by the entries there in issue. See T.D. 74-99, as modified by T.D. 74-196.

The pertinent provisions of TSUS read as follows:

Classified under:

Footwear (whether or not described elsewhere in this subpart) which is over 50 percent by weight of rubber or plastics or over 50 percent by weight of fibers and rubber or plastics with at least 10 percent by weight being rubber or plastics:

* * * * * * *

Other footwear (except footwear having uppers of which over 50 percent of the exterior surface area is leather):

* * * * * * *

700.60 Other ..... 20% ad val.

Claimed under:

Footwear, with uppers of fibers:

* * * * * * *

With soles of material other than leather:

700.70 With uppers of vegetable fibers . . 15% ad val.

Schedule 4, Part 4, Subpart B:

Subpart B headnotes:

1. This subpart covers all rubber whether or not obtained, derived, or manufactured in whole or in part from any product described in part 1 of this schedule.

2. For the purposes of the tariff schedules, the term "rubber" means a substance, whether natural or synthetic, in bale, crumb, powder, latex, or other crude form, which can be vulcanized or otherwise cross-linked, and which after cross-linking can be stretched at 68° F. to at least three times its original length and which, after having been stretched to twice its original length and the stress removed, returns within 5 minutes to less than 150 percent of its original length, and includes such substance whether or not containing fillers, extenders, pigments, or rubber-processing chemicals.

I. *The Decision of the Court of Customs and Patent Appeals in the Incorporated Case*

In reaching its decision in the incorporated case upholding the plaintiff's claim, the Court of Customs and Patent Appeals, in a 4–1 decision, first stated (61 CCPA at 22):

> The nature of the "Basketball High Shoes," apparently made with heavy midsoles for training purposes, may be seen from certain stipulated facts and from defendant's collective exhibit "A," which is a copy of U.S. Customs laboratory report No. S12355, referred to in the following stipulation.
>
> The stipulation reads:
>
> 1. The uppers are of vegetable fibers.
> 2. The footwear is in no part of leather.

3. The midsoles of the instant footwear contain, as components, among other things, "Natural Rubber RSS" and "Synthetic Rubber". That "Natural Rubber RSS" and "Synthetic Rubber" are substances, whether natural or synthetic, in bale, crumb, powder, latex, or other crude form, which can be vulcanized or otherwise cross-linked, and which after cross-linking, can be stretched at 68° F. to at least three times its original length and which, after having been stretched to twice its original length and the stress removed, returns within 5 minutes to less than 150 percent of its original length.

4. Both parties agree to be bound by a determination by the Customs Laboratory as to whether the vulcanized so-called iron powder midsole material can be stretched to three times its original length.[2]

5. Defendant's collective exhibit "A" is correct in its determination of the relative weights of the respective materials insofar as they were therein determined.

Defendant's collective exhibit "A" (Customs laboratory report No. S12355) includes the following statements:

> The midsoles in their present condition (containing the iron powder) are not capable of being stretched to three times their original length. In our opinion the rubber hydrocarbon of the midsole would conform to the physical requirements of the term "rubber" as defined in headnote 2, subpart B, part 4, schedule 4 of TSUSA 1969.
>
> The weight of each sneaker minus the lacing was found to be 272 grams (left sneaker) and 283.5 grams (right sneaker). The midsoles were found to weigh 156.5 grams (left sneaker) and 169.2 grams (right sneaker). Three tests on the midsole of the left sneaker showed an average of 89 percent by weight of iron and iron oxide. This is equivalent to 51.2 percent by weight of the left sneaker minus the lacing. Assuming 89 percent by weight of iron and iron oxide in the right midsole, the right sneaker minus the lacing contains 53.1 percent iron and iron oxide.
>
> * * * * * * *
>
> Three tests on the midsole of the right sneaker showed an average of 89.5 percent by weight of iron and iron oxide. This is equivalent to 53.4 percent by weight of the right sneaker minus the lacing.

In the incorporated case, the Government and the amicus curiae took the position that to be "rubber" within the meaning of headnote 2, it is only necessary that a substance contain a natural or synthetic rubber which in crude form, before adding any fillers, extenders, pigments or rubber-processing chemicals, is capable of being cross-linked or vulcanized and thereafter be capable of meeting the specified stretch

[2] In the present case, by agreement of the parties, plaintiff's motion to incorporate was granted with the qualification that paragraph 4 of the stipulation in the incorporated case is to read as follows:

> Both parties agreed that the determination by the Customs laboratory as to whether the vulcanized so-called iron powder cross-linked sole material can be stretched to three times its original length was correctly arrived at and represents the proper results of the test as performed.

Thus in the present case the defendant does not agree to be bound by the Customs laboratory's determination in the incorporated case.

and return tests prescribed by that headnote. As to the midsole in the imported basketball shoe there involved, the Government and the amicus curiae contended that the entire midsole is "rubber" under the headnote 2 definition because the specified stretch and return tests should apply only to the precursor natural and synthetic rubber materials (without filler) used in the manufacture thereof and the stretch and return tests do not apply to the finished midsole. 61 CCPA at 23.

The Court of Customs and Patent Appeals rejected this interpretation and agreed with the Customs Court that the correct interpretation of headnote 2 is that "rubber" means a substance in crude form, whether or not containing fillers, extenders, pigments, or rubber-processing chemicals, which is capable of being cross-linked or vulcanized and thereafter be capable of meeting the specified tests. Id. at 24. The appellate court added in this connection (ibid.):

> The interpretations of headnote 2 urged by the Government and by the amicus curiae require that only the "Natural Rubber RSS" and the "Synthetic Rubber" components (*excluding* the filler) of the midsole mixture be capable of being cross-linked and thereafter passing the stretch and return tests; whereas the filler is *included* for purposes of the weight determination under item 700.60, TSUS. In other words, they urge that the iron powder filler be excluded when making the qualitative chemical identification under headnote 2, but that the iron powder filler be included when making the quantitative weight determination under item 700.60, TSUS. We think these interpretations are inconsistent. Such inconsistency should not be imputed to the Congress in the absence of clear evidence of intent—evidence which does not appear in the record or briefs. [Emphasis in original.]

The Customs Court, however, found that plaintiff had not demonstrated that the midsole material in crude form (with an actual composition of about 10 percent by weight of rubber and about 90 percent by weight of iron powder) could not have been vulcanized or cross-linked in such a manner as to pass the stretch and return tests even though the actual samples submitted to the Customs laboratory could not pass those tests. Thus, the Customs Court imposed on the plaintiff the burden of proving that the midsole material could not have been cross-linked by another process to yield a cross-linked mixture which would, in fact, pass the stretch and return tests. 61 CCPA at 23. On this aspect, the Court of Customs and Patent Appeals reversed and stated (61 CCPA at 23–4):

> Our disposition of this appeal will focus on the midsole portion of the imported shoes since the midsole constitutes over 50 percent by weight of the total weight of each shoe. Both parties agreed to be bound by a determination of the Customs laboratory as to whether the imported midsoles are capable of being stretched to three times their original length. The Customs

laboratory determined that the imported midsoles are *not* capable of being stretched to three times their original length.

We hold that appellant met its burden of proof regarding the impropriety of the Government's classification by evidence in the form of the Customs laboratory report. We find that there is no evidence in the record showing that the Government, thereupon, met its burden of going forward to prove that the cross-linking could have been performed by *some other method* so that the midsole mixture would meet the stretch and return tests. It may be that in this case, involving as it does a mixture containing nearly 90 percent by weight of iron powder, the Government would be hard-pressed to make such an affirmative showing. [Emphasis in original.]

II. *Whether the Defendant has met its Burden of Proving that the Cross-Linking Could have been Performed by Some Other Method so that the Midsole Mixture of the Imported Footwear Would Meet the Stretch and Return Tests Required by Headnote 2*

A. *Testimony of Dr. Eckert*

Against this background, defendant in the present case called as a witness Dr. Charles F. Eckert, a chemist and research associate at Uniroyal, Inc., whose testimony, defendant insists, proves that the midsoles of the imported footwear could have been cross-linked by some other method so as to meet the statutory stretch and return tests for rubber, as specified in Headnote 2. We now consider that testimony. Dr. Eckert testified that as a chemist and research associate at Uniroyal he supervises the compounding and evaluation of various kinds of rubber compounds, most of which are used in tires. He has a Ph. D. in chemistry and his areas of research are in high polymers, mostly with rubber. The witness testified that, using the generally recognized standards of the American Society of Testing Materials (ASTM), he attempted to duplicate the recipe for the midsole material of the imported footwear as set out in defendant's exhibit J.[3] The witness stated, however, that he was not certain of the accelerator used, but used what he thought was intended.

Dr. Eckert stated that stretch and return tests were performed on the recipe purporting to duplicate that in defendant's exhibit J as well as on other recipes of greater cross-linking on greater iron content. The test results were obtained in most instances at 72° room

[3] This recipe was stated by the manufacturer of the imported footwear to be as follows (defendant's exhibit J):

Material	Quantity	Weight (percent)
Natural Rubber RSS	2,200 gm.–4.8500 lbs.	7.47
Synthetic Rubber	540 gm.–1.1905 lbs.	1.83
Stearic Acid	20 gm.–0.0441 lbs.	0.07
Zinc Oxyde [*sic*]	100 gm.–0.2205 lbs.	0.34
Sulphus [*sic*]	40 gm.–0.0882 lbs.	0.14
Anti-oxydent [*sic*] (Anti C)	20 gm.–0.0441 lbs.	0.07
Acceralator [*sic*] DM	16 gm.–0.0353 lbs.	0.06
Acceralator [*sic*] D	7 gm.–0.0154 lbs.	0.02
Iron Powder	26,500 gm.–58.4219 lbs.	90.00
	29,443 gm.–64.9100 lbs.	100.00

temperature rather than at 68° as specified in TSUS. However, the difference between tests performed at 72° and tests performed at 68° were immeasurable according to the witness. With respect to the tests performed on the recipe purporting to duplicate the recipe in defendant's exhibit J, Dr. Eckert testified that the tests for elongation resulted in a 240-percent increase in length before breaking (which means that the material was stretched to 3.4 times its original length before breaking) and that the stretch and return tests resulted in the material returning to 104, 110, and 113 percent of its original length.

Dr. Eckert stated that other recipes tested contained higher percentages of iron powder and demonstrated that elongation decreased as the percentage of iron powder increased. Additionally, he observed that when informal stretch tests were conducted on a recipe of higher sulfur content, lesser elongation resulted. He further observed that elongation will also decrease with the age of the rubber, as well as with the pro-oxident effect of iron powder acting to decrease elongation.

On cross-examination, Dr. Eckert stated that he used 40-mesh iron powder in his recipe although the manufacturer's recipe did not specify the size of the iron powder. He testified that he did not know what effect a different size mesh powder would have but that the results would be different. Dr. Eckert then performed in open court a hand stretch test on a sample of material from the recipe purporting to duplicate the midsoles in issue. Breakage occurred at a point where it was unascertainable if it stretched to three times its original length. A second test in open court was conducted on a duplicate sample which was stretched to more than three times its original length and returned to less than 150 percent of its original length within 5 minutes.

On further cross-examination, Dr. Eckert testified that he was unfamiliar with the commercial production of rubber for footwear as he was not involved in commercial production at all. His activities were strictly limited to research and development. He testified that the mixes he used in the recipe were made in a ratio of one-twentieth of the amounts actually shown on the original recipe, defendant's exhibit J, supra. He acknowledged that he made only one batch of materials for the test and that he would not rely upon the test results of one batch in the development of a product which he was testing for his own company. He further acknowledged that there was a possibility of error which could be as much as 100 percent in converting the recipe to his sample.

In converting the material at a ratio of 1 to 20, Dr. Eckert conceded that only the weight of the iron, rubber and zinc was double checked. None of the other components, including the sulfur, was double

checked. The witness admitted that sulfur has an effect upon vulcanization, that it is the primary curing agent, and that it will have an effect on the ability of a mix to meet the stretch and return tests.

Dr. Eckert testified further on cross-examination that the rubber used in his tests was a high grade of "clean rubber" which is used for laboratory experimentation and that he doubted that this type of rubber was the type used in manufacturing footwear. He added that use of a high grade clean rubber as opposed to a less pure rubber of lower density would have an effect on the ability of the sample to meet the stretch and return tests. And he conceded that the slightest variation in the materials used could have a bearing on the ability of the sample to meet the stretch and return tests.

B. *Testimony of Dr. Eirich*

To rebut the testimony of Dr. Eckert, plaintiff called as a witness Dr. Frederick R. Eirich, distinguished professor of polymer chemistry at the Polytechnic Institute of New York. Dr. Eirich's field of specialization is polymer chemistry and has been since his dissertation in 1932. Dr. Eirich is currently engaged in the preparation of an advanced textbook on rubber technology which was commissioned by the Educational Committee of the Division of Rubber Chemistry of the American Society of Chemists. Prior to Dr. Eirich's position at the Polytechnic Institute of New York, he held teaching positions at the University of Cambridge, England, and at the University of Vienna. Dr. Eirich has also acted as a consultant to a number of industries related to rubber and its manufacture, as well as plastics and its manufacture; and had conducted training seminars in industry, including a seminar at Uniroyal. Dr. Eirich was chairman of the Gordon Conference of the American Association for the Advancement of Science—a research conference on polymers composed of a selected group of 100 scientists and leaders of industry. From 1972 to 1974 the witness was president of the American Society of Rheology.[4]

Dr. Eirich testified that he had performed the stretch and return tests as set forth in headnote 2 on a portion of an illustrative exhibit of the imported merchandise and that the material had failed to meet the tests. He further testified that he had witnessed the demonstration test conducted in open court by Dr. Eckert and that the test itself as well as the results of other tests conducted by Dr. Eckert outside of the court clearly showed that where the composition reached a 90 percent iron filler point (as in the case of the imported footwear) the elongation drops off considerably and often will not meet the test. Thus he stated that at the 90 percent iron filler point a precipitous fall

[4] Rheology is concerned with the flow, deformation and mechanical response of all materials, particularly polymeric materials and rubbers.

in the mechanical properties (elongation) occurs so that even one-half-percent iron filler below or above this 90-percent point throws the elongation results below or above the permissible limits for the stretch and return tests prescribed by headnote 2. He added that other very minor variations in the samples tested at this critical juncture point such as the type of accelerator, or minor variances in composition, could similarly throw the test results one way or the other.

Dr. Eirich testified that based on accepted scientific standards in the polymer industry, in order for the tests performed by Dr. Eckert to have statistical validity there should have been between ten to twenty samples taken from at least three or four batches. Consequently, according to the witness, the rapid variations in properties demonstrate that very minor changes in composition, the existence of indigenous flaws, and the existence of and size of voids as a result of the size of the iron powder filling, will all cause variations in the ability of the material to pass the stretch and return test. Dr. Eirich concluded that given the recipe set out in defendant's exhibit J under manufacturing conditions, you will have a set of conditions which will lead to general failure in terms of the stretch and return test.

Dr. Eirich testified that as to Dr. Eckert's laboratory tests, the results could not be statistically significant because there were not enough tests or enough batches to produce a spread of statistical significance. He stated that he would consider ten tests on each of three separate batches to be an adequate number of tests.

C. *Conclusion*

Based on the foregoing, it must be concluded that defendant has not met its burden of proving that the cross-linking could have been performed by some other method so that the midsole mixture of the imported footwear would meet the stretch and return tests required by headnote 2. For defendant has not established that the *same ingredients* as were used to manufacture the midsoles in issue could have been cross-linked by some other method so as to meet the stretch and return tests. Defendant's evidence in terms of the burden imposed by the Court of Customs and Patent Appeals came in the form of testimony and exhibits prepared by defendant's witness Dr. Eckert. At the outset, it is to be noted that Dr. Eckert, purportedly using the ingredients contained in the midsoles, was able to produce a sample which met the stretch and return tests set out in headnote 2. However, in preparing the mix for his tests, the witness used high grade pure rubber which he doubted is the type of rubber used in manufacturing footwear. Certainly, if these tests are to be given probative weight, commercial footwear rubber should have been used. Considering the witness' own admission that the slightest variation

in materials used could have a bearing on the ability of the mix to meet the stretch and return tests, this obvious deficiency in the tests performed cannot be overlooked.

There are other factors which also make questionable the validity of the results reached by Dr. Eckert. As was pointed out by plaintiff's witness Dr. Eirich, an insufficient number of test batches were made and an insufficient number of samples were tested in accordance with standards which would be applied scientifically in testing polymeric materials. In order for these tests to have had statistical validity there should have been at least ten to twenty samples taken from at least three or four batches.

Additionally, the recipe used by Dr. Eckert was made by reducing the manufacturer's weights and measures by a ratio of one-twentieth of the amounts actually shown on the manufacturer's recipe. Although Dr. Eckert made clear that the margin of error in measuring materials and putting them into a mix was as high as 100 percent, he admitted that only the iron, rubber, and zinc were double weighed. The other ingredients, including the antioxidants and the accelerators were not double weighed in spite of the fact that the amount of each of these ingredients could affect the ability of the sample to meet the stretch and return tests. It is particularly significant that there was no double check on the amount of sulfur used in the tests although it is clear from the testimony of Dr. Eckert that a variance in the amount of sulfur could materially affect the ability of the samples to meet the stretch test. The mesh size of the iron powder also could have affected the result of the tests. In this connection, Dr. Eckert used a 40-mesh iron powder because he did not know what size iron powder was used in the manufacturer's recipe. Further, notwithstanding the fact that the type of accelerator could have affected the test results, Dr. Eckert was not certain of the accelerator used.

In short, the test results reached by Dr. Eckert fall far short of meeting defendant's burden when it is considered: (1) That Dr. Eckert's tests were run under highly controlled laboratory conditions by a witness unfamiliar with the commercial production of rubber for footwear; (2) that the rubber used in the tests was different from that used in the commercial production of footwear; (3) that other components were used which may have differed from the constituent components used to manufacture the midsoles in issue; and (4) that the tests themselves were insufficient in quantum and quality in terms of accepted scientific standards in the industry.

III. *The Headnote 2 Test for Rubber*

As previously noted, in the incorporated case defendant and the amicus curiae took the position that a substance should be treated

as rubber if it contained natural or synthetic rubber which met the statutory stretch and return tests *before* any fillers, extenders, et cetera were added to the substance. Both this court and the Court of Customs and Patent Appeals disagreed holding that the tests must be applied to the substance with the filler included. If the substance, including the filler, does not meet those tests, it does not meet the definition of rubber.

Also, as previously noted, the Customs Service limited the decision of the Court of Customs and Patent Appeals in the incorporated case to the merchandise there in issue. T.D. 74–99, as modified by T.D. 74–196. In expressing its reason for limiting the decision, the Customs Service stated that it had uniformly interpreted the stretch and return tests prescribed by headnote 2 to apply only to the crude rubber without the filler, and that it "believes that additional technical trade evidence and evidence of legislative intent is available to support this interpretation, and that additional arguments may be raised in support of the assigned classification." T.D. 74–196 at page 355. In the present case, additional trade evidence was introduced, but that evidence was merely cumulative of that in the incorporated case. In the incorporated case, defendant called one witness from Uniroyal, Inc. and one from Converse Rubber Co. The essence of their testimony was that a substance is rubber if the elastomer is rubber, irrespective of the effects that any fillers may have on the elastomer. In the present case, defendant again called witnesses from Uniroyal, Inc. and Converse Rubber Co., along with a witness from American Synthetic Rubber Co. The testimony of these additional witnesses adds nothing to the testimony of the witnesses in the incorporated case. The opinion of these witnesses in both this and the incorporated case is simply in conflict with the governing statutes, headnote 2, defining rubber as interpreted by the Court of Customs and Patent Appeals. On this question of law, their opinion simply must yield to that of the court.

The limiting decision by the Customs Service also states the belief that there is evidence of legislative intent available to support defendant's interpretation of headnote 2. As to this, defendant has presented a detailed legislative history of item 700.60 which demonstrates that it was the intent of Congress to protect the rubber sole footwear industry by valuing such footwear on the basis of American selling price in order to equalize the costs of production of such footwear in the United States and competing countries.[5] In this regard, it is to

[5] Headnote 3(b) to schedule 7, pt. 1A, TSUS, as amended by sec. 57(a) of the Tariff Schedules Technical Amendments Act of 1965, 79 Stat. 945, reads as follows:

(b) Subject to the provisions of section 336(f) of this Act, the merchandise in item 700.60 shall be subject to duty upon the basis of the American selling price, as defined in section 402 or 402a of this Act, of like or similar articles manufactured or produced in the United States.

be observed that the Customs Service did not apply the American selling price valuation to the imported footwear here in issue (see defendant's brief, p. 2, n. 3). But even aside from this, while it appears from the legislative history of item 700.60 that Congress did indeed intend to close certain loopholes pertaining to the provisions for shoes which are over 50 percent by weight of rubber or plastics, this legislative history is not controlling on the meaning of the Headnote 2 definition of rubber which covers *all* rubber products in TSUS. As Judge Rich stated in his concurring opinion in the incorporated case (61 CCPA at 25):

> * * * [T]he Tariff Schedules have provided in Headnote 2 a statutory definition of "rubber" *which is not only controlling here* but obviously intended to apply to *every* item in the TSUS referring to "rubber" * * *. [Emphasis added.]

Further, the intent of Congress with regard to the stretch and return tests prescribed by headnote 2 *must* have been directed to the rubber compound as imported with the filler because that is the only possible way the test could be performed. Again to quote from what Judge Rich stated (61 CCPA at 27):

> As I read Headnote 2, I have to reject the argument that in testing the midsole material for compliance therewith one should ignore the principal component of that material—the iron powder, which is a "filler." Under the headnote the term "rubber" includes a cross-linked material (10%) and filler of iron powder (90%). It is not technically possible, I believe, to add "filler" to a cross-linked or vulcanized elastomer; the filler has to be compounded with the crude substance, after which they are vulcanized together. I do not see how the Customs Court can object to the fact that the laboratory stretch tests were performed on the "*finished midsoles.*" If one wishes to know whether they are made of "rubber," they cannot be performed in any other way. The stretch tests, as specified in Headnote 2, apply only to cross-linked material—and "whether or not containing fillers." [Emphasis in original.]

The ASTM definition of "rubber products" is to similar effect in making clear that once filler material is added to a rubber or synthetic rubber, there is no way that the rubber can be removed from the compound to be tested for stretch and return qualities. See "1964 Book of ASTM Standards." Thus, this publication states (ASTM designation D 1566–62 T, p. 801, defendant's exhibit S):

> In some cases, where diluent loading is high (as in flooring and shoe soles), * * * the prescribed test [a stretch and return test with different parameters from the Headnote 2 test] *cannot be made* because the rubber has been modified to such an extent that it no longer possesses elastomeric properties. The major

> polymeric constituent must be identified by other means, and if it is identified as one of the well recognized rubbers which without plasticizers or other diluents would pass the prescribed test, the article is a *rubber product.* [Emphasis added.]

Beyond that the ASTM definition for "rubber products" is totally distinguishable from the ASTM definition for "rubber." *Ibid.* In the present case, we are concerned only with the tariff definition of "rubber" and not with a definition of "rubber products" because (again turning to Judge Rich's concurring opinion, 61 CCPA at 25–6):

> If rubber is being defined for the purposes of *all* the tariff schedules, many of which cover products made of or containing rubber in which the rubber is, of necessity, *not* crude but in its finished state—vulcanized, cross-linked or whatever else it may be called—then it must have been the intent of Congress to write a definition that applies to both crude and vulcanized rubber. [Emphasis in original.]

Thus, it becomes apparent that the stretch and return tests prescribed by headnote 2 must of necessity be applied not only to rubber in its crude state but also in its finished state (i.e., vulcanized, cross-linked, or otherwise compounded) if the tariff definition of rubber contained in headnote 2 is to be applied to TSUS for *all* purposes.

Finally, the amicus curiae argues that the plain meaning of headnote 2 based on grammatical construction is that the stretch and return tests of that headnote are applicable only to elastomers in crude form. However, this very argument has been considered and rejected by the majority decision of the Court of Customs and Patent Appeals in the incorporated case.

IV. *Whether the Imported Footwear was Properly Classified Under Item 700.60 on the Basis that the Footwear is in Chief Weight of Plastics or a Combination of Rubber and Plastics*

The defendant in its appeal in the incorporated case attempted to raise an issue based on the alternative contention that the importer had failed to establish that the imported footwear was not over 50 percent by weight of plastics under item 700.60 and that the Government's classification under that provision was therefore presumptively correct. The Court of Customs and Patent Appeals did not consider this question since it was raised for the first time on appeal. 61 CCPA at 24–5. In essence, defendant now makes that alternative claim here. For the reasons that follow, it must be concluded that this claim is lacking in merit.

In the first place, it is obvious from T.D. 74–99, as modified by T.D. 74–196, *supra,* that the sole reason for the Government limiting the decision of the Court of Customs and Patent Appeals in the incor-

porated case was the disagreement with the finding of that court that the footwear was not rubber. Second, defendant has admitted in its supplemental answer to interrogatory No. 3 (plaintiff's exhibit 2), that the classification "was predicated on the assumption that [the footwear] was composed of rubber." In the same answer defendant admitted that this assumption or conclusion was in turn based upon its construction of schedule 4, part 4, subpart B, headnote 2, "which construction was not upheld in C.A.D. 1112." Since the presumption attendant upon the classification was based on this erroneous conclusion, plaintiff has "disproved the correctness of the assigned classification by showing it resulted from the erroneous reasoning" of the classifying officer. *Hub Floral Corp.* v. *United States*, 77 Cust. Ct. 21, 23, C.D. 4669, 422 F. Supp. 283, 285 (1976) (*appeal dismissed*, Apr. 5, 1977). The presumption of correctness does not attach to the alternative classification of the footwear as plastics when that alternative classification is negated by defendant's own admissions that the classification was based on the assumption that the footwear was rubber.

Aside from these admissions which establish the erroneous nature of the classification, there are additional considerations which prevent the presumption of correctness from attaching to the alternate classification of the footwear as plastics. Under TSUS, the terms rubber and plastics are mutually exclusive. Schedule 7, part 12, headnote 1(a) states that for purposes of the tariff schedules "the term '*rubber*' refers to rubber, as defined in part 4B of schedule 4." Schedule 7, part 12, headnote 1(b) states that for purposes of the Tariff Schedules "the term '*plastics*' refers to (i) synthetic plastics materials as defined in parts 1C and 4A of schedule 4 * * * *but does not include rubber*." [Emphasis added.] Schedule 7, part 12, headnote 1(c) states that for purposes of the tariff schedules "the term '*rubber or plastics*' means rubber, plastics, or combinations of rubber and plastics." Therefore the classification must have been based on the conclusion that the imported footwear was over 50 percent by weight of one of the three following categories: (1) Rubber, (2) plastics, (3) combinations of rubber and plastics.

If defendant contends that the presumption attaches to the alternative categories of rubber and plastics, then the presumption of correctness attaches to neither of those categories. *United States* v. *White Sulphur Springs Co.*, 21 CCPA 203, T.D. 46728 (1933); *Arthur J. Humphreys* v. *United States*, 66 Cust. Ct. 24, C.D. 4163 (1971); *Domestic Marble & Stone Co.* v. *United States*, 64 Cust. Ct. 360, C.D. 4003 (1970); *Broadway-Hale Stores, Inc.* v. *United States*, 63 Cust. Ct. 194, C.D. 3896 (1969); *Gallagher & Ascher Co.* v. *United States*, 39

Cust. Ct. 1, C.D. 1892 (1957); *S. S. Kresge Co.* v. *United States*, 25 Cust. Ct. 89, C.D. 1269 (1950); *Sterling Button Co.* v. *United States*, 4 Cust. Ct. 213, C.D. 324 (1940). Under these decisions, it is clear that defendant cannot contend that its classification is based upon the conclusion that merchandise fell within more than one category of merchandise even if the separate categories fall within the same paragraph or item number. The failure to apprise the importer under which category the merchandise was classified, if the admissions have not already done so, will result in the presumption of correctness attaching to none of those categories.

The decision in *United States* v. *New York Merchandise Co.*, 58 CCPA 53, C.A.D. 1004, 435 F. 2d 1315 (1970) is completely distinguishable from the case at bar. That case involved stuffed animal radios. The Court of Customs and Patent Appeals sustained this court's decision holding the imported merchandise to be properly dutiable as radios under item 685.22, TSUS. The articles were classified by the Government under item 737.30 as toy figures of animate objects. Defendant asserted an alternative classification in the event that its original classification was not upheld; that is, that the imported articles should be classified as toys, n.s.p.f., under item 737.90. The Court of Customs and Patent Appeals stated that defendant was entitled to the presumption of correctness on its alternative claim because the alternative classification was implicit in the original classification; that is, the original classification and the alternative classification were as toys. The Court held that the defendant was entitled to rely upon the presumption of correctness attaching to the subsidiary finding in the original classification that the imported articles were toys. 58 CCPA at 58–9.

In the case at bar, rubber and plastics are alternative categories and a classification in one of those categories is not implicit from a classification in the other. On the contrary, under schedule 7, part 12, headnote 1(b) those categories are mutually exclusive.

However, irrespective of whether the presumption of correctness attaches to the alternative claim by defendant for plastics, such a claim is clearly rebutted by the record in this case. The only competent testimony in this case with respect to the plastics issue was that of plaintiff's witness Dr. Eirich who, as indicated, is a distinguished professor of polymer chemistry, which embraces the entire field of rubber and plastics. Dr. Eirich testified that the components of the midsole in issue as set forth in defendant's exhibit J could not be characterized as a plastic because: (1) The constituents (viz., natural rubber, synthetic rubber, stearic acid, and zinc oxide) are not the components used in making plastic; (2) the materials would not meet

the statutory definitions for "plastics materials" and "synthetic plastics materials" as contained in TSUS schedule 4, part 1, subpart C, headnote 3, and schedule 4, part 4, subpart A, headnote 2; (3) iron powder would not be a filler for plastics materials under the ASTM definition because it is not a "relatively inert" material.

In short, defendant's contention that the imported footwear is in chief weight of plastics or a combination of rubber and plastics cannot be sustained.

V. *Ultimate Conclusion*

For the foregoing reasons, the court holds that the imported footwear is classifiable, as claimed by plaintiff, under item 700.70 as "[f]ootwear * * * [w]ith soles of material other than leather: [w]ith uppers of vegetable fibers." Judgment will be entered accordingly.

(C.D. 4774)

PISTORINO & COMPANY, INC. *v.* UNITED STATES

Plastic Molding Machines

Plastic molding machines used in the production of shoe heels and soles held properly classifiable under item 678.35, TSUS, as machines used for molding or otherwise forming rubber or plastics articles, rather than duty free as shoe machinery under item 678.10, TSUS, in view of the lack of evidence establishing that the machines belonged to a class or kind of articles chiefly used as shoe machinery at the time of importation.

Where an importer fails to establish that the machinery with which imported molds are to be used is shoe machinery, the molds cannot be classified as shoe machinery molds and are properly classifiable as other molds used for rubber or plastics materials under item 680.12 or 680.15, TSUS.

Court Nos. 73-10-02911, etc.

Port of Boston

[Judgment for defendant.]

(Decided October 30, 1978)

Doherty and Melahn (*Walter E. Doherty, Jr.* and *Robert Emmett Mullin, Jr.* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Bruce M. Mitchell*, trial attorney), for the defendant.

RAO, Judge: These actions concern the proper tariff classification of "Plastak MT 10" and "Gesta SS 200" machines, and molds imported with these machines, exported from Italy and entered at the port of Boston in 1970, 1971, and 1972. The MT 10 is manufactured by Plastak Machinery, Italy, and the SS 200 is manufactured by Gesta S.p.A., also in Italy.

The machines were assessed with duty by the district director under item 678.35, TSUS, as modified by Presidential Proclamation 3822, T.D. 68–9, as machines used for molding or otherwise forming rubber or plastics, articles, and parts thereof, at a duty rate of 5.5 percent ad valorem for 1972 and at a duty rate of 6.5 percent ad valorem for those machines imported in 1971.

The molds were classified in some entries under item 680.12, as modified, *supra*, at a duty rate of 8 percent ad valorem for 1970 [6.5 percent ad valorem for those imported in 1971] as "Molds of types used for metal (except ingot molds) * * * or for rubber or plastics materials: Molds used for rubber or plastics materials: * * * Other," and in some entries under item 680.15, TSUS, as modified, *supra* at the same rates of duty (depending on date of entry) as other molds used for rubber or plastics materials.

It is plaintiff's claim that the merchandise, both machines and molds, is properly free of duty; the machines being classifiable as shoe machinery and parts thereof under item 678.10, TSUS, and the molds being classifiable as molds, shoe machinery molds, under item 680.11, TSUS, as amended.

The question presented by this civil action is whether the imported machines belong to a class or kind of machinery chiefly used in the production of shoes, and similarly, whether the imported molds are used with a class or kind of machinery chiefly used in the production of shoes.

The operative interpretive rule is general interpretative rule 10 which states in part:

> (e) in the absence of special language or context which otherwise requires—
>
> (i) a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of articles of that class or kind to which the imported articles belong, and the controlling use is the chief use, i.e., the use which exceeds all other uses (if any) combined;
>
> * * * * * * *

The central issue then becomes whether the Plastak MT 10 and the Gesta SS 200 belong to a class or kind of machines susceptible of

classification as machines used for molding rubber or plastics materials as determined by the district director, or whether, as claimed by plaintiff, they belong to a special class or kind of plastic molding machines chiefly used in the production of shoe parts.

Plaintiff attempted to meet its burden of proof through the testimony of three witnesses and the introduction into evidence of eleven exhibits. The evidence and testimony adduced tended to establish that the MT 10 is an injection plastic molding machine with a clamping force of 33 tons and an injection capacity of 6 ounces. To the knowledge of plaintiff's witnesses it is used exclusively for the molding of shoe heels, although toplifts can also be produced with a modification of the platen system. The platen is approximately 6 by 11 inches and is bored out to accept only one kind of mold. According to the brochure depicting the MT 10 circulated by the manufacturer and entered into evidence by plaintiff, this machine has a clamping force of 42 tons and produces three pairs of heels per minute or six pairs of toplifts per minute.

The SS 200 is a two-station molding machine which operates on an intrusion molding principle, that is, it utilizes a screw which is rotated through a hole which causes the plastic material to flow or be forced into the mold cavity. It can, according to the brochure introduced into evidence by plaintiff, produce two pairs of soles simultaneously at a rate of between 60 and 140 pairs of soles per hour depending on the type and size.

It was the testimony of plaintiff's witness that the MT 10 and the SS 200 would require extensive and expensive modification before they could be employed to mold other items such as combs, checkers, and screwdriver handles, since these machines cannot accept a plastic material of great hardness without changes in the hydraulic and clamping systems, although no testimony was introduced as to the amount of expense which would be involved.

The testimony of defendant's witnesses tended to establish similarities between the imported machines and general purpose molding machines manufactured in the United States and used in this country to mold a variety of articles, including shoe soles and heels. In the opinion of defendant's witnesses, Lawrence Bauer and Murray Freedman, both horizontal and vertical injection molding machines can produce a variety of articles, so long as the molds fit within the configuration of the platen, the changing of molds is an inexpensive and customary practice in the molding industry, and the imported MT 10 and SS 200 could be used, economically, to produce a number of articles such as combs, checkers and other small items, although they knew of no instance where they had been so used.

Plaintiff's evidence established that the MT 10 and the SS 200 are actually used in this country to manufacture parts of shoes, specifically, to mold shoe heels and soles. However, it is plaintiff's burden to prove that the imported machines belong to a class or kind of machines whose chief use is as shoe machinery. We do not conclude that it has met that burden.

When chief use is in dispute, it is usually a question of fact which should be established on the basis of positive testimony representative of an adequate geographical cross section of the country. *L. Tobert Co.* v. *United States*, 41 CCPA 161, 164, C.A.D. 544 (1953). Chief use envisions use by users, as a whole, of the type of article involved, and not merely individual use of the particular machines in question. *W. A. Gleeson* v. *United States*, 58 CCPA 17, C.A.D. 998, 432 F. 2d 1403 (1970). Particularly with regard to shoe machinery, such chief use must be established by positive testimony with respect to merchandise of the same class or kind. *E. Dillingham, Inc.* v. *United States*, 54 CCPA 121, C.A.D. 922 (1967). This is a question of fact to be determined by the relevant facts and circumstances in each case. *Howland* v. *United States*, 53 CCPA 62, C.A.D. 878 (1966).

To determine whether the imported machines belong to a special class or kind commonly used as shoe machinery, we must look to all the pertinent circumstances. *United States* v. *Carborundum Co.*, 63 CCPA 98, C.A.D. 1172, 536 F. 2d 373, *cert. denied*, 429 U.S. 979 (1976). Factors which have been considered to be pertinent in determining whether imported merchandise falls within a particular class or kind include the general physical characteristics of the merchandise; the expectations of the ultimate purchasers; the channels, class or kind of trade in which the merchandise moves, *Maher-App & Co.* v. *United States*, 57 CCPA 31, C.A.D. 973, 418 F. 2d 922 (1969); the environment of the sale and the manner in which the merchandise is advertised and displayed, *United States* v. *Baltimore & Ohio R.R.*, 47 CCPA 1, C.A.D. 719 (1959); the use, if any, in the same manner as merchandise which defines the class; the economic practicality of so using the import and the recognition in the trade of this use, *Bob Stone Cordage Co.* v. *United States*, 51 CCPA 60, C.A.D. 838 (1964).

The first factor, the general physical characteristics of the imported merchandise, were not shown to be significantly different from those of general purpose plastic molding machines. Although there was some evidence that the maximum closing power of the MT 10 was somewhat less than that of other general purpose injection molding machines in use in this country at the time of importation, the manufacturer's brochure states that this factor is 42 tons, as compared to 50 tons for similar machines used for general injection molding in the

United States. Both the MT 10 and the domestically manufactured general purpose injection machines possessed platens, injection rams, plasticising chambers, control stations, rotating screws, clamping units, and ejection mechanisms.

As to the SS 200, it also contains components common to most injection molding machines in use in this country at the time of importation. It can produce both heels and soles and performs insert molding functions. It is capable of producing a variety of articles including athletic padding, prosthetic devices and shock absorber materials.

The record shows that, although the MT 10 and the SS 200 are actually used to produce heels and soles, the Plastimac, the predecessor to the MT 10, was and is being used to mold a variety of articles and was purchased because it was a general purpose injection molding machine. No other evidence as to the expectations of the ultimate purchasers was adduced.

The manner in which the merchandise is advertised and displayed is somewhat supportive of plaintiff's position in that the machines are advertised as "heel and toplift making machine[s]" (the MT 10) and as "sole units injection moulder[s]" (the SS 200) in the respective brochures. However, defendant's witness, Murray Freedman, president of Boston Toplift and Cut Sole Co., had seen the SS 200 in operation at trade shows and had reviewed descriptive literature on it, and it was his opinion that it was a general vertical injection molding machine with an insert molding function. Thus, the manner in which it is merchandised or displayed led buyers of shoe machinery and other general purpose plastic molding machinery to conclude that the imported merchandise belongs to a class or kind of machinery defined as general purpose plastic molding machines.

The use of other general purpose plastic molding machines in making both shoe heels and shoe soles described by defendant's witnesses persuades this court that it is the mold rather than the machine that determines what type of plastic article will be produced, and that given a mold which fits within the configuration of the platen of a specific machine, almost any plastic article or part can be manufactured. This use is widely recognized in the trade.

Another factor to be considered is the commercial or economic feasibility of using the merchandise as general purpose molding machines. It is in this area that plaintiff has not sustained its burden and satisfactorily demonstrated to the court that the merchandise belongs to a special class consisting of merchandise classifiable as shoe machinery. Plaintiff's evidence to the effect that it would be "very expensive" to change the molds so that other articles than shoe soles

and heels could be produced on the imported machines was more than met by the testimony of defendant's witnesses who testified that mold changing was a simple, customary function in the molding industry and that adapting the imported machines to accept other molds would not involve an expense of more than $200 to $800. Additionally, the brochure for the SS 200 states that "mold changing is extremely fast and requires no skilled labour and no tools."

Considering the pertinent factors relied upon in prior cases and those which are present here, we conclude that the imports are not of a special class or kind commonly known as shoe machinery. Considering the cases cited by plaintiff, we are not convinced that they are supportive of its claim. *Converse Rubber Company* v. *United States*, 69 Cust. Ct. 55, C.D. 4374 (1972) held that the imported merchandise was shoe machinery based on a finding of fact that the multiple stations [10 in all] were particularly suitable for manufacturing the numerous sizes of shoe soles required by the industry, and on a finding that efforts to sell the machines to manufacturers of other plastic articles were unsuccessful in that it was not economical to produce these items on a 10-station machine costing $200,000.[1]

In *Theo. H. Davies & Co.* v. *United States*, 70 Cust. Ct. 5, C.D. 4399 (1973), the court considered whether certain crawler-mounted machinery used in harvesting sugar cane was properly classifiable as harvesting machinery. In determining that it was, in fact, a member of a special class or kind of machinery, the court made the following comparison with shoe machinery:

> The situation here is analogous to that involved in recent shoe machinery cases where the question was whether the imported merchandise belonged to a broad class, such as slush molding or injection molding machines, or a narrower class comprising a particular kind of slush molding or injecting molding machine, chiefly used as shoe machinery. *E. Dillingham, Inc.* v. *United States*, 65 Cust. Ct. 224, C.D. 4082 (1970); *Converse Rubber Company* v. *United States*, 65 Cust. Ct. 453, C.D. 4121 (1970), *decision on rehearing* 69 Cust. Ct. 55, C.D. 4374 (1972).
>
> In the *Dillingham* case the issue was whether molds for use with a particular slush molding machine were parts of a class or kind of machinery chiefly used for producing shoes. The court held that to establish that the Bata monoplax unit (the machine with which the molds were used) belonged to a class of merchandise chiefly used as shoe machinery, it would have to be shown that there was a kind of slush molding machinery which was chiefly used as shoe machinery and that the Bata monoplax unit belonged to that class. Since such evidence was lacking, the protest was overruled.

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[1] The instant machines cost between $12,000 and $14,000, a significant difference in price to the merchandise in *Converse Rubber* held to be shoe machinery.

Analogously, plaintiff should have shown that there was a kind of injection molding machinery which was chiefly used as shoe machinery and that the MT 10 and the SS 200 belong to that class.

In *E. Dillingham, Inc.* v. *United States*, 54 CCPA 121, C.A.D. 922 (1967), the court held that plaintiff had failed to establish chief use of the imported merchandise, molding machines, as shoe machinery, stating:

> For all we know, the imported machinery may be used in any manufacturing operation where molding is one step. Cf. *Louis G. Freeman Co.* v. *United States*, 58 Treas. Dec. 1060, Abstract 13580 where certain "leather-splitting machines" were deprived of the benefit of free entry as shoe machinery since the machines could be used in any factory where splitting [*sic*] leather was needed for any purpose, including the manufacture of shoes.
>
> The fact that the imported article is being used in the manufacture of shoes is insufficient to establish chief use.

In *W. A. Gleeson* v. *United States*, 58 CCPA 17, 22, C.A.D. 998, 432 F. 2d 1403 (1970), the court considered slush molding machinery claimed by the importer to be shoe machinery. In concluding that plaintiff had failed to establish chief use as shoe machinery, the court stated:

> [W]e find the testimony regarding the use of the particular molding machine appellant imported insufficient proof of chief use. Chief use envisions use by users, as a whole, of the type of commodity involved, and not merely individual use of the particular shipment in question. *United States* v. *Spreckles Creameries, Inc.*, 17 CCPA 400, 402, T.D. 43835 (1930).

The legislative history of the term "shoe machinery" as used in the Tariff Act of 1930 was considered at length in *United States* v. *Hudson Shipping Co.*, 49 CCPA 92, 95–96, C.A.D. 802 (1962). The court concluded:

> Congress, in using the term "shoe machinery" in paragraph 1643 of the Tariff Act of 1930, having before it the foregoing Summaries of Tariff Information, appears to us to have intended to cover specialized machines particularly adapted for and used in the manufacture of shoes * * *.

The "Tariff Classification Study" of 1960 did not evidence any intent on the part of Congress except to continue the duty-free status of shoe machinery and parts thereof [see p. 275 of schedule 6].

The "Summaries of Trade and Tariff Information," although not conclusive as legislative history, can be used as a guide in determining Congressional intent. Shoe machinery is discussed in schedule 6, Volume 10, pages 23–27 (1969). Excluded from classification as shoe machinery is "machinery for molding or forming rubber or plastics (other than complete footwear), item 678.35," and "shoe machinery molds for forming rubber or plastic materials, item 680.11" (p. 23).

Additionally, in the discussion on U.S. imports, the Summaries state:

> The bulk of the imports are classified under item 678.10 and consist of such articles as plastic-injection machines which produce a complete shoe . . . . Plastic-injection machines which mold a complete shoe account for a significant share of the value of imports, although the number of such machines imported is small. [P. 26.]

Thus, it appears that Congressional intent to exclude general purpose plastic molding machines from classification as shoe machinery unless a complete shoe or other footwear is molded is expressed in the Summaries.

The Molds

The record reflects, and plaintiff has submitted ample proof, that the molds are an integral part of the imported molding machinery. However, failure to show chief use of the machine, in legal contemplation, as shoe machinery controls the classification of the molds. In *W. A. Gleeson* v. *United States*, *supra*, the court considered certain rebuilt equipment for slush molding plastic footwear and the molds to be used with these machines. In deciding that the plaintiff had failed to carry the burden of proving that the chief use of the slush molding machines was as shoe machinery [see this opinion, *supra*], the court also held that failure to prove such chief use requires that the molds could not be classified as shoe machinery molds.

While at first blush it would appear that this results in an anomalous ruling wherein molds that are actually used only in the manufacture of shoe parts are not classifiable as shoe machinery molds, but rather as other molds used for rubber or plastics materials, this result is not as incongruous as it might at first appear to be.

The clear words of the statute and judicial interpretation of principles of chief use require that classification under item 680.11 as shoe *machinery* molds be predicated on the merchandise being chiefly used with shoe machinery. In addition to our finding that the imported MT 10 and SS 200 were not, for tariff schedule purposes, shoe machinery, there was testimony to the effect that the molds imported for use with the MT 10 were also used on other general purpose plastic molding machines such as the Battenfeld, and could be used with the Reed-Prentice and Van Dorn horizontal injection molding machines which are also general purpose injection molding machines used to mold a variety of articles other than shoe parts.

We therefore affirm the classification of the molds as "other" molds under item 680.12 or item 680.15, TSUS.

Conclusion

Plaintiff having failed to establish that the chief use of the imported merchandise was as shoe machinery and as shoe machinery

molds, the presumption of correctness attaching to the classification by customs was not overcome and these consolidated actions are dismissed.

Judgment will enter accordingly.

(C.D. 4775)

SANYO ELECTRIC, INC. *v.* UNITED STATES

ON DEFENDANT'S MOTION TO DISMISS

Court No. 75-5-01288

Port of Los Angeles

Motion granted; action dismissed.]

(Dated October 31, 1978)

Sharretts, Paley, Carter & Blauvelt (*Patrick D. Gill* of counsel) for the plaintiff.
Barbara Allen Babcock, Assistant Attorney General (*David R. Ostheimer*, trial attorney), for the defendant.

MEMORANDUM OPINION AND ORDER

WATSON, Judge: The protest underlying this action protested the classification of the imported merchandise under item 685.50 [1] of the Tariff Schedules of the United States and requested classification under item 685.30 [2] or item 678.50.[3] Thereafter the entry was reliquidated following classification under item 685.30, one of the alternatives requested in the protest. However, plaintiff filed a civil action, seeking classification under its alternative claim of item 678.50.

Defendant has moved to dismiss the action for lack of the jurisdictional prerequisite of the denial of the protest [4] asserting that it has granted the protest in question. Plaintiff responds that the protest was denied in part because one alternative claim was rejected. It seeks to characterize this as the denial in part referred to in 19 U.S.C. section 1514(a)[5] and 28 U.S.C. section 1582(a).[6]

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[1] Item 685.50, as modified by T.D. 68-9, covers other radiotelegraphic and radiotelephonic transmission and reception apparatus, dutiable at 7½ percent valorem.

[2] Item 685.30, as modified by T.D. 68-9, covers radio-phonograph combinations, dutiable at 6½ percent ad valorem.

[3] Item 678.50, as modified by T.D. 68-9, covers machines not specially provided for, dutiable at the rate of 5 percent ad valorem.

[4] 28 U.S.C. sec. 1582(c):
The Customs Court shall not have jurisdiction of an action unless * * * a protest has been filed * * * and denied * * *.

[5] 19 U.S.C. sec. 1514(a):
[D]ecisions of the appropriate customs officer * * * shall be final * * * unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Customs Court * * *.

[6] 28 U.S.C. sec. 1582(a):
The Customs Court shall have exclusive jurisdiction of civil actions instituted by any person whose protest * * * has been denied, in whole or in part * * *.

Although plaintiff's argument has a certain facile attractiveness its underlying premise is faulty. It assumes that denial in part arises from a measurement of what is granted against what is requested, that is to say, from a calculation which gives sole consideration to the protest. But this leads to the absurd result that a protest with alternative claims can never be completely granted unless *all* the claims are granted and even the selection of the alternative most favorable to the protesting party would still be a denial in part.

In reality, the proper measure of the extent to which a protest has been denied or granted is the extent to which the protest has resulted in a change of the protested decision. When the decision is entirely changed to conform to a decision sought by the protest, that protest has been completely granted. The only logically consistent way to determine whether a protest has been denied in part is to see whether any part of the protested decision remains in effect.

If a party's preference for a rejected alternative claim is so strong that it wishes to pursue the claim even following the granting of another alternative claim, then its true quarrel is with its own claim and is not cognizable in a civil action designed to resolve disputes regarding decisions of the appropriate customs officer. The proper procedure would be for the party to advance its preferred alternative claim in a new protest against the revised decision following the reliquidation of the entry.

For the above reasons, it is

ORDERED that defendant's motion to dismiss be, and the same hereby is, granted.

(C.D. 4776)

ROUSSEL CORP. *v.* UNITED STATES

On defendant's motion to sever and dismiss in part and plaintiff's cross-motion for leave to file an amended complaint

Court No. 75-6-01572

Port of New York

[Defendant's motion granted; plaintiff's motion granted.]

(Dated October 31, 1978)

Serko & Simon (*Margaret H. Sachter* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Sidney H. Kuflik*, trial attorney), for the defendant.

Memorandum Opinion And Order

Watson, Judge: Plaintiff filed two protests [1] against the liquidation of the same entry [2] the second of which enumerated further grounds for the claim made in the first that the assessment of additional duties under item 948.00 pursuant to Presidential Proclamation 4074 was incorrect.

Defendant has moved to sever and dismiss this action insofar as it relates to the denial of the second protest on the ground that section 514(b)(1) of the Tariff Act of 1930, as amended (19 U.S.C. sec. 1514 (b)(1)) allows only one protest to be made for each entry of merchandise unless the entry covers different categories of merchandise (a circumstance which is not present here). Defendant is correct and its motion must therefore be granted. *See Russ Togs, Inc.* v. *United States*, 79 Cust. Ct. 119, C.D. 4722 (1977); *Webcor Electronics* v. *United States*, 79 Cust. Ct. 137, C.D. 4725 (1977). *See also Ataka America, Inc.* v. *United States*, 79 Cust. Ct. 135, C.D. 4724 (1977).

Plaintiff is nevertheless at liberty to advance the grounds raised in the second protest as an amendment to the complaint because under 28 U.S.C. section 2632(d) the court may consider any new grounds in support of an action if it applies to the same merchandise and relates to the same protested decision.

This cannot be done by the court simply treating the second protest as an amendment of the first because it did not purport to be an amendment and did not comply with the customs regulations concerning the form and contents of amendments (19 CFR sec. 174.14(b) and (c)). Nor could the court exercise the same flexibility in the labeling or treatment of prior administrative filings as it might in the case of inappropriately named pleadings.

The proper way to advance the grounds asserted in the improper second protest is by way of amendment to the complaint, for leave to make which plaintiff has cross-moved. Although defendant has raised objections to the substance of the proffered amendment they are best reserved for a motion directed against the amended complaint.

For the above reasons, it is

Ordered that defendant's motion to sever this action and dismiss it as it relates to the denial of protest No. 1001–4–016521 be granted, and it is further

Ordered that plaintiff's motion for leave to file a first amended complaint be granted, and it is further

Ordered that the clerk of the court accept and file the amended complaint appended to plaintiff's motion.

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[1] Protest No. 1001–4–008243 filed on Aug. 8, 1974 and protest No. 1001–4–016521 filed on Oct. 31, 1974.

[2] Entry No. K150096 liquidated on Aug. 2, 1974.

(C.D. 4777)

HAWAIIAN INDEPENDENT REFINERY *v.* UNITED STATES

Petroleum products—Validity of assessment of customs duties on light and heavy gas oil consumed within a foreign trade zone

I. A foreign trade zone is "an isolated, enclosed, and policed area, operated as a public utility, in or adjacent to a port of entry, furnished with facilities for lading, unlading, handling, storing, manipulating, manufacturing, and exhibiting goods, and for reshipping them by land, water, or air." 15 CFR 400.101.

II. Foreign and domestic merchandise may be brought into a trade zone and therein stored, sold, exhibited, broken up, repacked, assembled, distributed, sorted, graded, cleaned, mixed with foreign or domestic merchandise or manufactured without being subject to the customs laws of the United States. 19 U.S.C. 81c.

III. Duties under the Tariff Schedules of the United States may be imposed only upon articles imported into the Customs territory of the United States from outside thereof. General headnote 1, Tariff Schedules of the United States.

IV. The customs territory of the United States does not include the area comprising a foreign trade zone. 19 CFR 146.1(c).

V. Foreign crude oil imported into a foreign trade zone, partially processed and refined and therein consumed and used as a secondary and supplemental source of fuel in a refining process, is not subject to duty under the Tariff Schedules of the United States.

VI. Whether the use of fuel oil as a secondary and supplemental source of fuel in the refinery of a foreign trade zone constitutes or should constitute a permissible activity or use is a determination to be made by the Foreign Trade Zone Board subject only to judicial review as to reasonableness and consonance with the purpose and intent of the Foreign Trade Zone Act.

VII. A nonpermissible activity or use with respect to foreign merchandise within a foreign trade zone cannot be corrected or remedied by a duty unilaterally imposed thereon by the Customs Service.

Court No. 73-10-02750

Port of Honolulu

[Judgment for plaintiff.]

(Decided November 6, 1978)

Glad, Tuttle & White (*Jonathan K. Bellsey* and *George R. Tuttle* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Velta A. Melnbrencis* and *Susan C. Cassell*, trial attorneys), for the defendant.

BOE, Judge: This case presents a question of statutory interpretation and application with respect to the administration of the Foreign Trade Zones Act, as amended, 19 U.S.C. 81a *et seq.* A foreign trade zone is "an isolated, enclosed, and policed area, operated as a public utility, in or adjacent to a port of entry, furnished with facilities for

lading, unlading, handling, storing, manipulating, manufacturing, and exhibiting goods, and for reshipping them by land, water, or air." 15 CFR 400.101 (1972). Pursuant to the provisions of section 3 of the Foreign Trade Zones Act, as amended, 19 U.S.C. 81c:

> Foreign and domestic merchandise of every description, except such as is prohibited by law, may, without being subject to the Customs laws of the United States, except as otherwise provided in this chapter, be brought into a zone and may be stored, sold, exhibited, broken up, repacked, assembled, distributed, sorted, graded, cleaned, mixed with foreign or domestic merchandise, or otherwise manipulated, or be manufactured except as otherwise provided in this chapter, and be exported, destroyed, or sent into Customs territory of the United States therefrom, in the original package or otherwise; but when foreign merchandise is so sent from a zone into Customs territory of the United States it shall be subject to the laws and regulations of the United States affecting imported merchandise: * * *.[1]

For purposes of the entry of foreign merchandise and the payment of Customs duties thereon, a foreign trade zone is not considered to be a part of the Customs territory of the United States. 15 CFR 400.101 (1972); see also 19 CFR 146.1(c) (1972). The issue to be resolved in this case is whether foreign merchandise which is used as an integral part of a permissible manufacturing process within a zone, but which never enters the Customs territory of the United States, is subject to duty under the Tariff Schedules of the United States.

The merchandise, invoiced variously as "industrial fuel oil," "gas oil," "heavy gas oil," and "light gas oil," was processed from foreign crude oil imported into foreign trade subzone 9–A in Oahu, Hawaii, and manufactured at plaintiff's oil refinery located therein. The merchandise was then stored and used as needed as a source of fuel for the refinery's operations. The Customs Service required plaintiff to file consumption entries for the merchandise so used as fuel within the zone [2] and classified the fuel under either TSUS, item 475.05 as fuel

[1] Immediately following the statutory language quoted in the text, section 3 of the act contains a proviso which reads in pertinent part:

> *Provided*, That whenever the privilege shall be requested and there has been no manipulation or manufacture effecting a change in tariff classification, the appropriate Customs officer shall take under supervision any lot or part of a lot of foreign merchandise in a zone, cause it to be appraised and taxes determined and duties liquidated thereon. Merchandise so taken under supervision may be stored, manipulated, or manufactured under the supervision and regulations prescribed by the Secretary of the Treasury, and whether mixed or manufactured with domestic merchandise or not may, under regulations prescribed by the Secretary of the Treasury, be exported or destroyed, or may be sent into Customs territory upon the payment of such liquidated duties and determined taxes thereon. If merchandise so taken under supervision has been manipulated or manufactured, such duties and taxes shall be payable on the quantity of such foreign merchandise used in the manipulation or manufacture of the entered article. * * *

The privilege to which this proviso refers was not requested by the plaintiff in the instant action. Thus, the merchandise in question was listed in the subzone as nonprivileged merchandise, *see* 19 CFR 146.23 (1972), which under section 3 of the act could only be appraised and classified and its duties liquidated thereon when "sent into the Customs territory of the United States."

It must be emphasized at this juncture that the determination which the Court makes in the instant action is limited to the subject matter merchandise, that is—nonprivileged foreign merchandise.

[2] The specific merchandise involved in the present action was "entered" between September and November 1972.

oil testing under 25° API (0.125 cents per gallon) or item 475.10 as fuel oil testing 25° API or more (0.25 cents per gallon). The plaintiff protested this decision and claims the merchandise is nondutiable because it never entered customs territory. As an alternative claim, the plaintiff submits that, if dutiable, the merchandise should be classified under TSUS, item 475.15 as "natural gas, methane, ethane, propane, butane, and mixtures thereof," entitled to free entry.

I

In order to better understand the genesis of the present controversy, it will be helpful to set forth a brief account of the establishment of foreign trade subzone 9–A, as well as of the operations of plaintiff's refinery in the zone during which the merchandise in issue was both manufactured and subsequently used. Much, though not all, of this information was presented at the trial of this case through the testimony of plaintiff's sole witness Mr. Paul C. Joy,[3] and by plaintiff's introduction of four documentary exhibits.

A

In November 1968, the State of Hawaii, as the grantee of foreign trade zone 9 in Honolulu, applied to the Foreign Trade Zones Board [4] for the grant of a permit to establish a noncontiguous subzone in which an oil refinery would be constructed by the plaintiff. The proposed refinery was intended to process solely foreign crude oil into semifinished and finished petroleum products, primarily for export. An examiner's committee, appointed by the Board, *see* 15 CFR 400.1308–1309 (1972), held hearings on the application in both Honolulu and Washington, D.C. in December 1968, and January 1969, and subsequently filed a report recommending that the application be approved. *See 31st Annual Report of the Foreign Trade Zones Board* at 4 and n.1 (1969). The application was formally approved by the Board in April 1970. *See* 35 F.R. 6672 (1970).

Once the grant was procured, construction of the refinery commenced. Actual refining operations began in April 1972. Shortly before the refinery became operational, however, the plaintiff was informed by Customs that the portion of the refinery's product which was to be used for fuel within the subzone was considered to be dutiable merchandise. Customs required plaintiff to install a special meter to measure the amount of this fuel and required the filing of periodic consumption entries therefor. *See* plaintiff's collective exhibit 3.

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[3] Mr. Joy is the vice president of the plaintiff who conceived the idea for a foreign trade zone refinery and handled all the technical requirements for its establishment.

[4] The Foreign Trade Zones Board is the administrative body charged by Congress with the ultimate responsibility for administering the Foreign Trade Zones Act. It is composed of the Secretary of Commerce, who serves as its Chairman, and the Secretaries of the Treasury and the Army. *See* 19 U.S.C. 81a(b).

B

The merchandise here in issue was manufactured and subsequently used as fuel in a process which began with the unloading of crude oil from a tanker by means of an offshore pipeline which carries the crude to one of several storage tanks inside subzone 9–A. In order to refine the crude oil, it is withdrawn from the storage tank by means of a pump which transports the crude to a crude oil heater. This heater, operated at temperatures of between 1500° F and 2000° F, raises the temperature of the crude to a range between 650° F and 700° F. Once this temperature range is achieved, the crude is pumped into a column known as the distillation or fractionating unit. Here the more volatile components of the crude—those with boiling points under 650° F—are vaporized and move up the column and are separated or "fractionated" and then condensed into their respective boiling point fractions. Once condensed, these components, such as refinery gas, naphtha, and kerosene, exit the distillation unit and may thereafter be further refined into finished commercial petroleum products. A fraction of the crude which vaporizes in the distillation unit is so volatile or unstable, however, that it will not condense as it moves up the column. Because it is not economically feasible to store this component in a gaseous form, it is routed back into the crude oil heater furnace, where it is flared and used as the primary source of fuel for the production of heat to run the refinery.[5]

In the distillation unit, the heavier and more stable components of the crude oil—those which will not vaporize at 650° F—move to the bottom of the column. A portion of this hot oil (a combination of light gas oil, heavy gas oil, and atmospheric residuum or industrial fuel oil) is withdrawn from the bottom of the column and is channeled to the refinery's feeder tank. As it enters the feeder tank, it is measured by the meter required by customs. This oil in the feeder tank, which is the merchandise involved in this proceeding, is used to provide a secondary source of fuel for the heat required in the refinery's operations. Whereas the volatile, noncondensable fuel gas produced in the distillation unit is used almost immediately as the primary source of fuel, this heavy oil in the feeder tank is used as a supplemental source.

In order to use this oil to produce heat, however, further processing is required. As needed, the oil is withdrawn from the feeder tank by means of a pump which raises the pressure of the oil to 350–400 pounds per square inch. It is pumped into a steam preheater which reduces the viscosity of the oil (making it more liquefied) by raising

[5] The Customs Service has never attempted to impose duties upon this noncondensable fuel gas.

its temperature. The nonviscous oil is then pumped into an atomizing device and there is subjected to high pressure steam causing a turbulent reaction which produces a very fine fog of liquid droplets. This atomized fog of liquid oil and steam droplets exits the atomizer through an opening in the burner nozzle into the furnace of either the steam boiler or the crude oil heater wherein it is subjected to intense heat in the burner firebox.[6] As these liquid droplets absorb radiant heat, they decompose or crack and form more basic fuel elements such as methane, ethylene, propane, and propylene. The atomized fog of these more basic and now gaseous elements continues to be subjected to intense heat until it reaches its ignition temperature. At this point, air is introduced into the burner through a separate port and its combination with the now gaseous material and the high temperature causes combustion to occur resulting in the release of intense amounts of heat energy which is used in the refinery's steam boilers and crude oil heaters. The gaseous material further decomposes with this release of heat energy into carbon dioxide and water vapor and is released into the atmosphere.

II

The defendant's argument for the dutiability of the merchandise is predicated upon the fact that the statutory language does not specifically authorize foreign merchandise to be "consumed" as a part of the permissible manufacturing activities within a zone. Thus, contends the defendant, the general rule that all foreign merchandise imported into the United States is subject to duty unless specifically exempted, is controlling herein.

The Government's reliance upon the general rule of dutiability with respect to the issues in this case appears to be misplaced. The basis for the defendant's position is found in general headnote 1 to the Tariff Schedules of the United States, providing that:

> All articles *imported into the customs territory of the United States* from outside thereof are subject to duty or exempt therefrom as prescribed in general headnote 3.[7] [Italics added.]

It will be noted from the aforequoted headnote, however, that dutiability is expressly conditioned therein upon the importation of foreign articles "*into the Customs territory of the United States* * * *." From the statutes and regulations relating to trade zones, it appears that a patent distinction is drawn between the boundaries delineating the geographical territory of the United States and the Customs

[6] Mr. Joy testified that maximum atomization is important to give the mixture an optimum surface area with which to absorb the radiant heat in the firebox.

[7] General headnote 3 specifies the method for computing the particular rates of duty which apply to merchandise from different countries and insular possessions.

territory of the United States. Customs regulations pertaining to foreign trade zones make such a distinction by specifically exempting trade zones from the definition of "Customs territory":

> "Customs territory" is the territory of the United States in which the general tariff laws of the United States apply *but which is not included in any zone.* [19 CFR 146.1(c) (1972). Italic added.]

Accordingly, since it is clearly established by all of the evidence as well as conceded by defendant's answer that the subject merchandise never physically entered the Customs territory of the United States, it, indeed, would follow that the merchandise is not subject to duty while remaining within the trade zone.

The defendant, however, attempts to avoid this conclusion by advancing the contention that the purpose for the establishment of a foreign trade zone, separate and distinct from "Customs territory," is at variance with the general rule of dutiability upon imported foreign merchandise, and that, accordingly, the legislative enactment creating a trade zone must be strictly construed. Such a construction, the defendant argues, dictates that nonprivileged foreign merchandise brought into a trade zone is nondutiable only if its use is in connection with an activity or operation specifically enumerated in section 3 of the act. Thus, continues the defendant, if it is determined by the Customs Service that a particular activity is not expressly enumerated by section 3, the provisions of the act are inapplicable and the merchandise automatically is deemed to be within the Customs territory of the United States and subject to duty.

Suffice it to say, the acceptance of such a fiction or rationalization for the purpose of justifying the collection of revenue by way of Customs duties would do violence to the express language of the Foreign Trade Zones Act. Section 3 thereof is prefaced by the all-inclusive statement:

> Foreign and domestic merchandise of every description, except such as is prohibited by law, may, without being subject to the Customs laws of the United States, *except as otherwise provided in this chapter*, be brought into a zone * * *. [19 U.S.C. 81c. Italic added.]

The foregoing statutory language will permit no other interpretation but that merchandise is not subject to the customs laws while in a zone, unless the Foreign Trade Zones Act authorizes their application.[8]

[8] An example of a limited authorization for the application of the Customs laws to merchandise within a zone is the act's provision for privileged merchandise. Pursuant to this statutory authorization, the owner may request Customs to take his merchandise under supervision and to appraise and classify it and liquidate its customs duties thereon while the merchandise is still in the zone. Duties so liquidated are not collected, however, until the merchandise actually enters the Customs territory. *See* note 1, *supra*.

As stated in note 1, the merchandise here in issue is *nonprivileged foreign merchandise*.

Section 3 does not provide, as the Government would contend, that the Customs laws are fully applicable to merchandise within a zone except to the extent that the act specifically precludes their application. The aforequoted language clearly attests to the opposite: Exemption for merchandise in a zone from the Customs laws is the rule; dutiability for such merchandise under the Customs laws is an exception which must be specifically provided in some provision of the act. Unless specifically expressed by the act to the contrary, the transferal of such merchandise to the Customs territory is the occurrence which makes such merchandise dutiable under the Customs laws:

> * * * [B]ut when foreign merchandise is so sent from a zone into customs territory of the United States it shall be subject to the laws and regulations of the United States affecting imported merchandise * * *. [19 U.S.C. 81c.]

Resort to the legislative history of the Foreign Trade Zones Act, and its amendments, confirms the conclusion that foreign merchandise in a zone is not subject to duty until it actually enters the Customs territory of the United States. The act as originally passed in 1934, *see* act of June 18, 1934, 48 Stat. 999 (1934) (Celler Act), provided for the establishment of the zones and the permissible activities for which the zones could be used. The manufacture and exhibition of merchandise within a zone were expressly prohibited. In 1950, the act was amended to repeal this prohibition, and thereafter manufacturing and exhibition were expressly permitted. *See* act of June 17, 1950, 64 Stat. 246 (1950) (Boggs amendment). The Senate report accompanying the Boggs amendment clearly recognized that the foreign trade zone was a geographical entity separate and distinct from the Customs territory.

> A foreign trade zone is an isolated, fenced off, and policed area within or adjacent to a port of entry where foreign merchandise may be landed, stored, repacked, sorted, mixed, or otherwise manipulated with a minimum of Customs control and without Customs bond. *If such merchandise is brought into Customs territory*, it is subject to all Customs laws and regulations. [S. Rep. 1107, 81st Cong., 1st Sess. (1949). Italic added.]

In hearings before the House Committee on Ways and Means, the distinct nature of the foreign trade zone was noted by the sponsors of identical bills which were later substantially enacted as the Boggs amendment. Thus, Representative Ellsworth Buck, the sponsor of H.R. 6159 (80th Cong., 2d Sess. (1948)) testified:

> Reduced to its simplest terms, a foreign trade zone is a properly protected * * * area which is outside the Customs boundaries of the United States. Thus, from a Customs angle, a foreign

trade zone is not a part of the United States. [*Hearing on H.R. 6159 and 6160* Committee on Ways and Means, 80th Cong., 2d Sess. at 5 (1948) (hereinafter *Hearings*).]

The comments of Representative Emanuel Celler, the sponsor of H.R. 6160, and the moving force behind the enactment of the original act in 1934, are particularly instructive:

> * * * [I]n the manufacture of the article, there may be a considerable quantity of foreign merchandise or articles involved. The importing manufacturer does not have to pay the duty, for example, on the importation of the foreign material. He does not have to pay the duty on the manufactured article containing the foreign material *until it is actually taken out of the foreign trade zone and placed into Customs territory.* [*Hearings, supra* at 16, Italic added.]

In view of the fact that Congress, in enacting the Foreign Trade Zones Act and its amendments, has provided for distinct geographical zones separate from our Customs territory, the defendant's argument for the dutiability of the instant merchandise which remains within subzone 9–A is without persuasion. Merchandise which does not actually enter the Customs territory of the United States is not dutiable under the Tariff Schedules of the United States. *See* general headnote 1, *supra*.

In apparent recognition of the distinction made between foreign trade zones and the "customs territory" in the applicable statutes, the defendant advances the alternate theory that foreign merchandise which is "consumed" in a foreign trade zone may be considered to have been "constructively transferred" to the customs territory at the time of its use. As a basis for this contention, the defendant cites several provisions of the Customs Regulations which allow the constructive transfer of merchandise to customs territory without the present requirement for an actual physical transfer. *See generally*, 19 CFR 146.47(b)–(f), 146.48.[9] An examination of these regulations convinces this court that they provide no support for the defendant's position. First, the regulations provide that an application for constructive transfer must be filed with the District Director of Customs, thus making the process a voluntary one on the part of the person who wishes to transfer the merchandise. *See id.* Section 146.47(b). Second, and more important, after the application for the constructive transfer is approved, the merchandise must actually be transferred to Customs territory within a specified time period, *see id.* Section

[9] Sec. 146.48 of the regulations deals with the importation of merchandise such as is involved herein from a foreign trade zone into the customs territory. *See* 19 CFR 146.48(a)(1) (1972). Subsec. (b) of this regulation, *id.* sec. 146.48(b), provides that the mechanics for the constructive transfer of the merchandise are governed by the provisions of section 146.47(b)–(f). *See id.* sec. 146.47(b)–(f).

146.47(e)(2), or be restored to zone status. *Id.* 146.47(d). No authority is anywhere conferred upon customs to require the involuntary constructive transfer of merchandise which is never intended to, and which does not in fact, actually enter the customs territory of the United States.[10]

In holding the merchandise in question to be nondutiable, this court does not attempt to determine the propriety of defendant's major premise, that is—that the use of the oil in the feeder tank as a secondary source of fuel is not permissible under the act. Even were this court to assume that the use of this secondary source of fuel is not permissible, the fallacy in the defendant's position, however, lies in its postulate that the correction of such a nonpermissible use is effected by the imposition of a statutory duty. From the history of the act no indication appears that Congress intended this court to become the arbiter of permissible and/or nonpermissible intratrade zone activity.

Congress has charged the Foreign Trade Zones Board with the primary responsibility for administering the act. *See* 19 U.S.C. 81a(b). Pursuant to this obligation, the Board has promulgated regulations which must be complied with by an applicant seeking a zone permit. The regulations require the applicant to file an extensive and indepth series of exhibits setting forth his proposal for the establishment of a zone. *See* 15 CFR 400.603 (1972). These exhibits must spell out in detail the operations and use to which the zone or subzone will be

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[10] Forsooth, this has been the position of the Customs Service, itself. With respect to the consumption entries which it was required to file for the oil contained in the feeder tank, including those involved here, the plaintiff requested that it be allowed to constructively enter the merchandise as a gas since the oil was gassified prior to combustion. In a protest review decision involving different entries from those involved in this action, the Customs Service denied the plaintiff's request for constructive transfer by pertinently stating:

> With regard to the request for constructive transfer to Customs territory, this type of transfer is not covered in the Foreign Trade Zones Act, but was devised by Customs as a means of avoiding a double transfer of merchandise; that is, Customs laws do not permit entries for merchandise to be accepted until the merchandise has actually arrived in Customs territory. The Foreign Trade Zones Act spelled out no authority for merchandise to be entered while still physically in the zone except a limited authority for as much of the entry procedure as is necessary for liquidation in the case of privileged merchandise.
>
> Literal compliance with the law required a physical transfer of the merchandise outside the zone area before it could be entered. After entry, the merchandise could be transferred from its temporary resting place outside the zone to its intended destination. The double handling of merchandise being transferred from a zone into the commerce of the country was so expensive and troublesome that it might have ruined zone business.
>
> The difficulty has been eliminated by the concept that if the importer and zone operator joined in a written request, and the district director approved, the merchandise would be considered as if it had been transferred to Customs territory as of the time of the district director's approval, and all of the rights, liabilities, and procedural requirements which would have arisen in the case of an actual physical transfer would be considered as having arisen by constructive transfer as of the time of the district director's approval. The impractical double handling of the merchandise was thus eliminated.
>
> *As will be seen from the foregoing, constructive transfer was to provide relief in those instances where merchandise was expressly intended to be physically moved into Customs territory and not as to merchandise which could not be, and was never intended to be, physically moved,* as in the case here relating to the gaseous material which was not even created until after the gas oil had actually entered the furnace to be used as a fuel in the operation of the refinery. [*See* Plaintiff's collective exhibit 4; 9 Cust. Bull. 746, 749-50, P.R.D. 75-5 (1975). Italic added.]

devoted. Where activities are contemplated which are unauthorized under the act, the Board may either refuse to grant the permit, or may issue the permit upon specific conditions to prevent unauthorized activity. *See id.* section 400.700.

Following the receipt of a satisfactory application for subzone 9–A, the Board issued the permit authorizing a subzone for the specific purpose of establishing an oil refinery. The grant was in no way conditioned upon the use of duty-paid fuel to serve as the source of heat in the refining process. *See* 35 F.R. 6672 (1970). On the contrary, one of the advantages of the refinery in the subzone was that it would be self-contained, not requiring outside sources of fuel for its intended purpose of refining foreign crude.[11] It does not fall within the province of this court to determine in a proceeding of this character that the use of the instant merchandise, as an integral part of the intrazone refinery operation which was expressly permitted by the Board in issuing the zone permit, constituted an unauthorized activity under the act.

The court's determination of nondutiability in no way prevents the Customs Service from taking its case to the Board, if it continues to be of the opinion that the use of the fuel oil in the subzone's refining process is unauthorized. One of the Board's own regulations, codified at 15 CFR 400.807 (1972), contemplates such action by providing:

> When it shall be reported to the Board that any goods or *process of treatment* is detrimental to the public interest, health, or safety, the Board shall cause such investigation to be made as it may deem necessary. The Board may order the exclusion from the zone of any goods or *process of treatment* that in its judgment is detrimental to the public interest, health, or safety. [Italic added.]

The Board in turn may impose any conditions which it deems advisable upon the continued operation of the refinery in the subzone. *See id.* section 400.700. Such determinations by the Board are judicially reviewable at the request of the parties affected to determine their reasonableness and consonance with the purposes of the act. *See Armco Steel Corp.* v. *Stans*, 431 F. 2d 779 (2d Cir. 1970).[12]

This court may only observe that no necessary inconsistency exists between the grant of a permit for a subzone oil refinery using its own internally produced fuel and the purpose of the Foreign Trade

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[11] Plaintiff's witness, Mr. Joy, testified that the refinery was conceived with the idea of using the heavy oil in the feeder tank as an internal fuel for its operations, and not natural gas as domestic American refineries on the mainland would use. The reason for this was twofold: First, Hawaii has no indigenous source of natural gas, necessitating shipments from the mainland which would have been prohibitively expensive. Second, and most important, the subzone refinery was planned as competition for foreign refineries which do not use duty-paid fuel for their operations. The goal of successfully competing with foreign refineries was apparently borne out once the subzone became operational. *See* "35th Annual Report of the Foreign Trade Zones Board" at 1 (1973) [hereinafter "35th Annual Report"].

[12] Should the Customs Service remain dissatisfied with the situation even after a determination by the Board, it may request congressional action to correct any perceived "hole in the tariff wall." *See Armco Steel Corp.* v. *Stans*, *supra* at 784–85.

Zones Act to encourage and stimulate the international commerce of the United States. *See Fountain* v. *New Orleans Public Service, Inc.*, 387 F. 2d 343 (5th Cir. 1967). The history of the refinery's first full year in operation indicates that this purpose has been well served. *See* "35th Annual Report," *supra* at 1; *see also id.* at 41. The comments of the United States Court of Appeals in the *Armco* case are deemed appropriate:

> * * * The Act gives the Trade Zones Board wide discretion to determine what activity may be pursued by trade zone manufacturers subject only to the legislative standard that a zone serve this country's interests in foreign trade, both export and import. Because of the nature and complexity of the problem the factors entering into a Board determination are necessarily numerous, and it would seem incontrovertible that the Board must not be unduly hampered by judicial policy judgments that might cast doubt upon the wisdom of a particular Board decision. [*Armco Steel Corp.* v. *Stans, supra* at 785.]

This court, therefore, finds that the merchandise in question used as a secondary source of fuel in plaintiff's refinery located in foreign trade subzone 9–A, Oahu, Hawaii, is not subject to duty under the Tariff Schedules of the United States. The protest of the plaintiff is sustained.[13]

Let judgment be entered accordingly.

(C.D. 4778)

WOLF D. BARTH CO., INC. *v.* UNITED STATES

On defendant's motion to sever and dismiss

Court No. 75–12–03291

Port of Philadelphia

[Motion granted.]

(Dated November 9, 1978)

Shaw and Stedina (*Charles P. Deem* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Saul Davis*, trial attorney), for the defendant.

MEMORANDUM OPINION AND ORDER

WATSON, Judge: Defendant has filed this motion pursuant to rules 4.7(b) and 4.12 for an order severing and dismissing protest No. 1101–5–000472, covering entry No. 132131, from this action for lack of jurisdiction. It contends that the protest is untimely since it was

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[13] Because the court has determined that the merchandise in issue is nondutiable while it remains in the foreign trade subzone, it is unnecessary to address plaintiff's alternative claim that, if dutiable, the merchandise should be classified as a gas.

not filed within 90 days of liquidation as required by 19 U.S.C. 1514 as amended.

The motion is predicated upon the following undisputed facts: The involved entry was liquidated on January 3, 1975, at the port of entry at Philadelphia, Pa. On March 4, 1975 (within the 90-day protest period), plaintiff's attorneys forwarded a written protest against that liquidation to the office of the New York regional commissioner where it was received and stamped the following day. On April 29, 1975, after the expiration of the 90-day protest period, the New York regional commissioner returned a copy of the protest to the plaintiff showing that it was denied on April 25, 1975, and noting that the protest was erroneously accepted at New York. Subsequently, the involved protest was received by the district director at the port of Philadelphia on April 30, 1975, 116 days after the date of liquidation.

Plaintiff, opposing the motion, contends that although the protest was inadvertently misdirected to the regional commissioner of New York by its attorneys, it was seasonably filed and that the New York office failed to take any action on the protest until the protest time limitation expired. It argues that the unreasonable delay in returning it, at this point, can only be presumed to have been deliberate or otherwise improper, and therefore this court should not decline jurisdiction before exploring the facts of the delay in an evidentiary hearing.

Defendant, in its response, states that plaintiff's argument that the mistake of its attorneys is mitigated by an alleged breach of duty by the Customs officers at the port of New York is essentially based upon the doctrine of estoppel. That doctrine, asserts the defendant, has no application to suits against the United States where jurisdiction of the court is in issue, except where there is positive proof of affirmative misconduct by Government officials. Defendant urges plaintiff's claim that there was a breach of duty on the part of Customs officials in New York is without any factual foundation and submits the affidavit of Harry L. Hammer, the then head of the protest and control section of the New York region, in support of this position.

In his affidavit, Mr. Hammer avers, *inter alia*, that due to the large volume of protests received during the month of March 1975, the request for retrieval of the instant entry was made approximately 5 weeks after the receipt of the protest (Mar. 5, 1975), by which time the 90-day protest period had expired; that the filing error was noted on April 25, 1975, 22 days after the expiration of the statutory period; that plaintiff was notified of the error as soon as it was discovered. He further states that there is no evidence of any attempt to frustrate plaintiff's statutory right to file the involved protest.

19 U.S.C. 1514(b)(1)(2) requires in pertinent part that a protest be filed with the appropriate Customs officer designated in regulations prescribed by the Secretary of the Treasury within 90 days after

liquidation. It is undisputed that according to section 174.12(d) of the Customs Regulations, the appropriate Customs officer for the filing of the protest in this case was the district director at Philadelphia, Pa. where the involved entry was made.

Notwithstanding the foregoing statutory limitation, plaintiff maintains that the facts concerning the delay in returning the protest to it by the regional commissioner in New York should be explored in an evidentiary hearing and points to the court's recent decision in *Point Four Ltd., Inc.* v. *United States*, 78 Cust. Ct. 190, C.R.D. 77–4, 431 F. Supp. 1254 (1977), in support of its position.

In that case, the plaintiff-importer, acting without counsel, contended that it was advised by Customs personnel at the port of entry (Toledo, Ohio) that it should file its protests at Chicago, Ill.; that it seasonably mailed the protests to Chicago as advised; and that the Chicago office did nothing with the protests until the protest time limit expired and then forwarded them to the district director at the headquarters port (Cleveland, Ohio) where they were received and untimely filed. Thus, the foregoing was alleged by plaintiff in its complaint as follows:

> 3. Protest was mailed, upon advice of the Toledo office, to U.S. Customs Service, Chicago, Ill., February 27, 1976. They forwarded it to Cleveland, Ohio, office where it was stamped March 15, 1976 and dated filed as March 16, 1976.

The defendant, having obtained an order of the court on consent for an extension of time to file its answer, elected in the interim to file a motion to dismiss on jurisdictional grounds.

In the course of its opinion in *Point Four*, the court said at page 192: "If full credence be given to the allegations in the third paragraph of the complaint in this case it is clear that the ends of justice as well as the objective of the statute of limitations will be ill served by a declination of jurisdiction on the part of the court. But at this point in the proceedings a judgment in the matter either way is premature, there being no evidentiary record before the court in connection with this motion."

The court held that inasmuch as defendant had procured a postponement in the joinder of issue under a commitment to answer the complaint, it was appropriate that it be required to do so. Accordingly, it denied defendant's motion to dismiss, without prejudice, however, to its raising the jurisdictional issue by way of its answer.

It appears that the facts involved in *Point Four* and those herein are clearly distinguishable. In the former, plaintiff charged customs officials with affirmative deceptive conduct, while here there is no such contention. Moreover, the erroneous filing of the protest in the instant case was solely the result of an act done by plaintiff's attorneys and not any affirmative erroneous conduct on the part of customs

officials, as claimed in the cited case. Significantly, in *Point Four*, plaintiff alleged the foregoing affirmative erroneous conduct in its complaint while in the instant controversy the complaint is devoid of any such allegation. Indeed, plaintiff's assertion of presumed deliberate or otherwise improper delay on the part of customs officials appears initially in its opposition to this motion.

It seems quite clear that in *Point Four* the court was concerned that "the rights of importers will not be forfeited as a consequence of deceptive or improper practices indulged in by customs officials." Accordingly, the court cited the case of *A. H. Burr* v. *United States*, 9 Cust. Ct. 13, 19–20, C.D. 651 (1942), where there was improper delay by customs officials in time-stamping the importer's entry papers until after the closing of a cattle quota; *Henry A. Wess, Inc.* v. *United States*, 25 Cust. Ct. 34, 37, C.D. 1259 (1950), where the merchandise was examined by the wrong customs official acting under color of authority; *Snake King* v. *United States*, 18 Cust. Ct. 33, 34–35, C.D. 1041 (1947), where the protest was accepted by the deputy collector after the closing hour on the 60th day after liquidation. It appears that none of the factors involved in any of the foregoing cases are present in the one before us. The instant situation involves an allegation, enshrouded with a considerable degree of vagueness, of "presumed" deliberate or otherwise improper delay on the part of customs officials in returning a protest filed in the wrong place by plaintiff's attorneys.

While there may be some room for questioning the delay in returning the erroneously filed protest, little credence may be ascribed to that argument in the light of: (1) The mistake on the part of plaintiff's counsel and its failure to discover and correct the same prior to the expiration of the protest filing period; (2) the aforestated explanation of the delay by Mr. Hammer; and (3) plaintiff's failure to include in its complaint any allegations of deliberate or improper conduct on the part of customs officials.

A factual situation quite analogous to the one before us appears in the case of *United China & Glass Co.* v. *United States*, 53 Cust. Ct. 68, C.D. 2475 (1964). There, the involved merchandise was liquidated at the port of New Orleans. Plaintiff seasonably filed its protests with the collector at San Francisco. The involved protests were then forwarded by the San Francisco collector to the New Orleans collector and were received by him after the expiration of the protest time limitation period. The court in granting defendant's motion to dismiss the involved protests on the ground that they were untimely filed said: "The filing of protests, by whim or negligence, with some one or another of the many collectors in the United States, seems to us not to have been intended by Congress in enacting sections 514 and 515."

It appears that the reasoning of his court in the foregoing case is equally applicable to the situation before us.

Accordingly, it is

ORDERED that defendant's motion to sever the involved protest and to dismiss the action insofar as it relates to that protest be granted.

IT IS FURTHER ORDERED that defendant be given 30 days in which to reply to the complaint with regard to the remainder of the action.

(C.D. 4779)

PISTORINO & CO., INC. *v.* UNITED STATES

Beam cutting machines

Where plaintiff failed to establish that imported electrohydraulic beam cutting machines belonged to a class or kind of merchandise commonly known as shoe machinery, considering all pertinent facts and circumstances, the merchandise was properly classified by customs as machines not specially provided for and parts thereof under item 678.50, TSUS, and was not classifiable under item 678.10, TSUS, as shoe machinery and parts thereof, as claimed.

Court Nos. 73-10-02910 and 74-9-02446

Port of Boston

[Judgment for defendant.]

(Decided November 29, 1978)

Doherty and Melahn (*Walter E. Doherty, Jr.* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*David Ostheimer* and *Bruce M. Mitchell*, trial attorneys), for the defendant.

RAO, Judge: This consolidated civil action involves the classification of beam cutters or beam cutting machines and parts, manufactured by "Fipi" or "Atom" of Italy, imported from 1972 to 1974 and entered at the port of Boston, Mass. for the account of Hudson Shoe Machinery Co. The merchandise was invoiced as models F59, F63, F79S, and G888 electrohydraulic beam cutting machines or electrohydraulic beam presses.

On entry, the merchandise was classified by the district director under item 678.50, Tariff Schedules of the United States as modified by T.D. 68-9, as machines not specially provided for, and parts thereof, and assessed with duty at the rate of 5 percent ad valorem.

The importer claims that the merchandise is properly classifiable under item 678.10, TSUS, as shoe machinery and parts thereof, duty free.

The pertinent statutory provisions are:

Tariff Schedules of the United States

GENERAL HEADNOTES AND RULES OF INTERPRETATION

10. *General Interpretative Rules.*—For the purposes of these schedules—

* * * * * * *

(e) in the absence of special language or context which otherwise requires—

(i) a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of articles of that class or kind to which the imported articles belong, and the controlling use is the chief use, i.e., the use which exceeds all other uses (if any) combined;

* * * * * * *

Schedule 6, Part 4, Subpart H.—Other Machines

Classified under:		
678.50	Machines not specially provided for, and parts thereof	5% ad val.
Claimed under:		
678.10	Shoe machinery and parts thereof	Free

The parties have correctly stated the issue to be whether the imported merchandise, at the time of importation to the United States, belonged to a class or kind of articles chiefly used as shoe machinery; item 678.10, TSUS, being controlled by chief use.

At the onset, the court granted plaintiff's motion to incorporate the record of *C. H. Powell Co.* v. *United States*, 63 Cust. Ct. 302, C.D. 3912 (1969), into the record of the instant case. That case involved a Pedersen rapid beam cutting press and parts imported from Denmark in 1963 and 1964.

The plaintiff's evidence, consisting of the testimony of three witnesses and the introduction of three exhibits into evidence, established that the imported merchandise is sold to shoe manufacturers, with a small proportion being sold to companies that use the beam cutters to cut waxed paper, to cut material for baseball caps, to cut felts for buffing wheels and to cut materials for baseball gloves.

The imported machines have a bed dimension ranging from 16 by 59 inches to 30 by 79 inches and cutting plates ranging from 16 by 16 by 2 inches to 20 by 20 by 3 inches. The maximum cutting pressure is 20–25 tons. To cut material on these machines, the operator places a die on the material or materials to be cut, brings the trolley or cutting beam over the die, presses two buttons and holds them while the head comes down. The head strikes the die, cutting the material and then goes away from the material so that the die can be repositioned for a further cut. The dies range in size from 12 to 24 inches and are not imported with the machines under consideration.

The brochures through which the cutting presses are advertised and sold refer to the imported merchandise as "hydraulic beam cutting press[es]" and as "the finest hydraulic cutting equipment." The brochure also states that the Atom G888 "easily handles such items as soles, foam and plush type materials." There was also testimony that the machines cut numerous materials including manmade fabrics, vinyl-coated materials, cardboard and other materials of that nature, and are used to cut multiple layers of materials from single ply to 24 ply. It is plaintiff's position that the imported beam cutters are chiefly used in the shoe industry and that they constitute a class of beam cutters used as shoe machinery.

Defendant relied on the testimony of three witnesses and the introduction into evidence of seven exhibits. Its evidence tended to establish that the imported beam cutters are similar in all material respects to beam cutters manufactured in the United States and used as general purpose beam cutters, and that during the period of importation, such machines were used in many industries to cut many articles for a variety of industries, including the automotive, electronic, toy, and clothing industries. At this time, according to defendant's witnesses, the shoe industry did not use more than 50 percent of the cutting dies manufactured by the Boston Die Cutting Co. and Novelty Die Corp., both manufacturers of cutting dies for a variety of industries, including the shoe industry. Each of defendant's witnesses, with a number of years of experience in the beam cutting industry, was of the opinion that the imported beam cutters belong to a general class or kind of beam cutting machinery.

In addition, there was testimony that the imported machines could replace and be replaced by domestically manufactured beam cutters that are considered to be general purpose beam cutters.

When chief use is in dispute, it is a question of fact to be determined on the basis of positive testimony. *L. Tobert Co.* v. *United States*, 41 CCPA 161, C.A.D. 544 (1953). All of the pertinent facts and circumstances must be looked to to determine whether the imported machines belong to a special class or kind, commonly known as shoe machinery. *United States* v. *Carborundum Co.*, 63 CCPA 98, C.A.D.

1172, *cert. denied*, 429 U.S. 979 (1976); *Pistorino & Company* v. *United States*, 81 Cust. Ct. 106, C.D. 4774 (1978). The factors which have been considered important in this determination include the general physical characteristics of the merchandise; the expectations of the ultimate purchasers; the channels, class or kind of trade in which the merchandise moves; the environment of the sale and the manner in which the merchandise is advertised and displayed; the use, if any, in the same manner as merchandise which defines the class; the economic practicality of so using the import; and the recognition in the trade of this use. *See United States* v. *Carborundum Co., supra; Pistorino & Co.* v. *United States, supra;* and the cases cited therein.

In examining the physical characteristics of the imported merchandise, we find that there is little to set it apart from other beam cutters which are used as other than shoe machinery, that is, as general purpose beam cutters. A comparison of the brochures depicting the imported merchandise and the brochures depicting the domestically manufactured "Model M 'Hercules' Traveling Head Die Press" and the "Ormont Hydraulic Die Press" reveals more similarities than disparities. All have cutting table surfaces of approximately the same dimensions, cutting heads of approximately the same size, and all have a cutting stroke of about 4 inches. Although the cutting stroke of the imported merchandise is listed as being 3¼ inches, the significance of this difference was not demonstrated by plaintiff.

The maximum pressure of the imported machines is listed at 25 tons, that of the "Ormont Hydraulic Die Press" is listed at 30 tons and that of the "Model M 'Hercules' Traveling Head Die Press" at 25–50 tons. It was plaintiff's testimony, through its witness, Hank Kent, that a machine for cutting foam rubber would require a high tonnage pressure of 40 to 45 tons, which would be beyond the capability of the imported merchandise. However, there was testimony that the instant machines do cut foam rubber sole linings satisfactorily, and, indeed, the brochure for the G888 states that it "easily handles such items as soles, foam, and plush-type materials."

The evidence as to the expectations of the ultimate purchasers was sparse and can perhaps best be garnered from the method in which the machines are advertised, since generally merchandise is advertised in a manner calculated to fill or meet the expectations of potential purchasers. The brochures for the beam cutters do not refer to them as shoe machinery, nor do they allude to any particular feature of the merchandise that would distinguish it from the general class of beam cutters, or put it in a special class of beam cutters susceptible of use principally in the shoe industry. The brochures also refer to the ability of the beam cutters to handle foam and plush materials as well as soles, without limitation to those foams and plush materials used in the shoe industry.

Additionally, the Hudson F63 is also advertised in various issues of Diemaking Diecutting and Converting, a publication purporting to cover the diecutting field. On page 26 of the May–June, 1973 issue, the primary use areas for this machine are listed as textiles, plastics, foam goods, rubber, et cetera. The F59 is listed as being primarily used in footwear, textiles, and all types of multiply cutting. The F79S is listed as being used primarily in the garment trade, packaging, foam and plastic cutting areas. In the May–June, 1972 issue of the same periodical on page 22, the G888 is listed as being used primarily in the textiles, leather and plastics industries, with no mention being made of its use in the shoe industry. In the May–June, 1974 issue on page 16, the F63 is listed as being used primarily in the textiles, plastics, foam goods, and rubber industries; the F59 is listed as being used primarily in the footwear, textiles industries as well as for all types of multiply cutting. Finally, the F79 is depicted as being primarily used in the garment trade, packaging, and foam and plastics cutting trades. These issues of Diemaking Diecutting and Converting cover the period in which the instant merchandise was imported. Since the Hudson Shoe Machinery Co. provided the information about its machines for the publisher of this magazine, it is clear that it was expecting to appeal to industries other than shoe manufacturing.

The channels, class or kinds of trade through which the merchandise moved would also indicate that the machines are general purpose beam cutters. They are seen at trade shows where general purpose beam cutters are on exhibition. In factories in the United States, they are seen next to domestically manufactured beam cutters that are admittedly general purpose beam cutters. They replace and can be replaced by domestic beam cutters that are general purpose beam cutters, and they are considered competitive with domestic beam cutters that are general purpose beam cutters.

Although plaintiff introduced evidence that more than 80 percent of the imported machines were used by the shoe industry, it did not demonstrate satisfactorily that the chief use of this class or kind of merchandise is in the shoe industry. Defendant proved, through the testimony of witnesses, that the imported beam cutters belong to a general class of beam cutters used by a variety of industries including the garment industry, toy manufacturing, craft companies, and manufacturers of baseball hats and gloves, among others, and that the use by shoe manufacturers did not exceed all other uses.

Plaintiff did not establish that the imported beam cutters were economically impractical of use other than as shoe machines. Indeed, it was the testimony of plaintiff's witnesses that some of the imported machines were sold to other than shoe manufacturers. The literature on the instant merchandise states that the cutters may be used in the garment, foam cutting, packaging, and rubber industries and that the cutters may be used for "all types of multiply cutting." The

cutters will cut any material which requires 20 to 30 tons of pressure, as will the cutters manufactured by the domestic manufacturers such as Schwabe, Ormont, Sandt, and Shoen.

Considering the pertinent factors relied upon in prior cases and those which are present in this case, we conclude that the imported beam cutters are not of a special class or kind commonly known as shoe machinery. Nor does the holding of the incorporated case compel a finding in favor of plaintiff, as it can be distinguished from the case now before us. *C. H. Powell Company* v. *United States*, 63 Cust. Ct. 302, C.D. 3912, was decided in 1969 and involved merchandise imported in 1963 and 1964 from Denmark. The merchandise was a Pedersen rapid beam cutting press and parts therefor. The decision for the plaintiff that the merchandise was shoe machinery for tariff schedule purposes was based on a finding that plaintiff had proved a prima facie case that the imported merchandise, imported and sold solely to shoe manufacturers, was chiefly used in the manufacture of leather shoes.

The evidence before this court is that the nature of the industries to which beam cutters are sold has changed within this decade. While at one time beam cutters were used almost exclusively in the shoe industry, they are now used in a variety of industries and the use in the shoe industry does not exceed that of all other industries combined.

The issue in this case is not whether the imported merchandise is chiefly used as shoe machinery, but whether it belongs to a class or kind of machinery chiefly used as shoe machinery. In the *Powell* case, the court did not have before it any evidence of the use of similar machinery in this country at the time of importation. In the instant case, there is ample evidence that machines of the same class or kind as the imported merchandise are used in a variety of industries and that the use in the shoe industry is not the chief use. Defendant's witnesses testified to use of similar beam cutters in the automobile industry, in the garment industry, and, in fact, in all types of multiple cutting situations.

Additionally, the defense witness in *Powell* was unable to recall that he had ever seen a Pedersen beam cutting press in operation. In the instant case, defendant's witnesses were familiar with the imported machines, had seen them at trade shows, had seen them in operation in factories side by side with domestically manufactured general purpose beam cutters, and were of the opinion that they were interchangeable with other machines. This testimony is sufficient to rebut a prima facie case, if one has been made out by the plaintiff.

Plaintiff relies on the holding in *Maher-App & Co.* v. *United States*, 57 CCPA 31, C.A.D. 973 (1969), for the proposition that the class or kind of merchandise to be considered is not the broad, general class of merchandise, but a particular class. The merchandise being considered was twine held dutiable as twine under par. 1005(b) of

the Tariff Act of 1930, as modified by GATT, T.D. 51802, rather than binding twine dutiable under par. 1622 of the same act. In *Maher-App*, our appeals court held that where the plaintiff has not met the burden of proof of establishing that the merchandise belonged to a class or kind of twine chiefly used as binder twine having certain indispensable identifying characteristics, customs classification must be upheld. The court cited with approval the finding of the court below to the effect that:

> [I]t appears that the requisite yield of twine per pound is a major characteristic of binder twine as a class, absent which such twine will not be acceptable for the uses testified to by plaintiffs' witnesses. In short, the proper length per pound is an indispensable identifying characteristic of the class of twine known as binder twine. In light of this fact, the length of the instant twine becomes of central importance, not arising from the necessity of demonstrating that these particular shipments were used on the farm, but rather from the necessity of showing that the instant twine possesses those essential characteristics which the class possesses. In short, plaintiffs' failure of proof was in respect to showing that the instant twine belonged to the class of acknowledged binder twine * * *. [57 CCPA at 35.]

Based on the holding of *Maher-App*, it was incumbent on plaintiff to bring before the court proof of those indispensable identifying characteristics of the imported merchandise which set it apart from general purpose beam cutters and establish a special class of merchandise to which the imported machines belong. This plaintiff has failed to do. It is not enough for plaintiff to establish the chief use of the imported merchandise. *Bangor & Aroostook Railroad Co.* v. *United States*, 20 CCPA 96, T.D. 45724 (1932); Sturm, "A Manual of Customs Law," pages 221–22, and the cases cited therein.

In *United States* v. *Baltimore & Ohio R.R.*, 47 CCPA 1, C.A.D. 719 (1959), the court held that various small, after-dinner or demitasse china cups and saucers were properly classifiable as ornamental articles rather than as decorated china tableware, based on evidence which established that the merchandise had been particularly designed and marketed to appeal to those purchasers indulging in the fad of cup and saucer collection, that none of the other articles usually required for after-dinner coffee, such as creamer and sugar bowl, were imported contemporaneously, and that the merchandise was not displayed with dish sets, but rather as individual items and not in the area of the store in which dinner sets were sold. It is obvious that this case was controlled by the peculiar circumstances surrounding it. Plaintiff cannot point to similar circumstances in the instant case. The merchandise before the court is advertised with general purpose beam cutters, it is used in the same manner and in the same industries in which general purpose beam cutters are used, and plaintiff has introduced no evidence that the shoe industry is the sole market at which the merchandise is targeted. To the contrary, plaintiff has attempted to sell the beam cutters to various other industries, with some success.

In *United States* v. *Hudson Shipping Co.*, 49 CCPA 92, C.A.D. 802 (1962), the court considered a conveyor used to transport boxes from one section of a shoe factory to another and found that it did not constitute shoe machinery. Our appellate court found it to be no different from similar conveyors used in many other types of factories, with no features which particularly adapted it to the shoe industry. The court considered at length the legislative history of the term "shoe machinery" and concluded that Congress, in using that term, "intended to cover specialized machines particularly adapted for and used in the manufacture of shoes."

Plaintiff also attempts to rely on the 1929 "Summary of Tariff Information," schedule 5, page 2254, which states:

> In shoe machinery are included machines for cutting and sewing shoes and for other manufacturing operations. Many of these are highly specialized.

We do not interpret this language to evidence an intent on the part of Congress that any machines for cutting and sewing shoes are included in shoe machinery. An electric scissors which cuts leather and could be used to cut the parts of a shoe would not be deemed to be shoe machinery unless the importer could show that this particular scissors, because of its particular identifying characteristics, belonged to a class or kind of scissors chiefly used as shoe machinery. Similarly, a sewing machine which would have the ability to sew the various parts of a shoe would not be classified as shoe machinery unless similar evidence was before the court.

Conclusion

Plaintiff has failed to establish that the chief use of the imported beam cutters was as shoe machinery at the time of importation into the United States. The presumption of correctness attaching to the classification by customs has not been overcome, and the action is dismissed.

Judgment will enter accordingly.

(C.D. 4780)

Atkins Kroll & Co., Inc. v. United States

Second motion for rehearing

Court No. R65/5606

Port of Honolulu

[Motion denied.]

(Dated December 5, 1978)

Glad, Tuttle & White (*George R. Tuttle* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Velta A. Melnbrencis*, attorney), for the defendant.

RICHARDSON, Judge: The importer moves pursuant to rule 12.1 of the court rules for a rehearing of the order entered herein on September 15, 1978, denying a rehearing of the order entered herein on July 26, 1978, which dismissed the action for lack of prosecution pursuant to rule 8.3(b)(3) of the court rules. In support of the instant motion the importer sets forth an affidavit of attorney George R. Tuttle, dated October 13, 1978, in which it is averred, among other things, that it had been determined after inquiry by counsel that the merchandise in this case was similar in all material respects to merchandise in the consolidated case of *Atkins Kroll & Co., Inc.* v. *United States*, R65/10806–12169, etc., which was tried and submitted on September 19, 1978, and, on the basis of a recital of additional circumstances attending prior proceedings herein which culminated in plaintiff's first motion for a rehearing, urges the court to grant a rehearing in this action and to suspend the action under the heard-and-submitted action (R65/10806). Additionally, an accompanying statement submitted with the moving papers by the affiant urges vacatur of the dismissal of the action in view of the substantial work performed in the heard-and-submitted case (R65/10806).

The Government opposes the motion. The Government contends that the importer has failed to disclose grounds for a rehearing, pointing out that nothing in the statement or affidavit supporting the instant motion furnishes any grounds for a rehearing.

The court agrees with the Government. Rule 12.1(b) of the court rules requires that a motion for rehearing must clearly state the grounds upon which the moving party relies for the granting of rehearing. Apart from the fact that there appears to be no authority under the rules for entertaining a second motion for rehearing, the moving papers fail to set forth any grounds upon which a rehearing could be granted.

Dismissal of this action was predicated upon lack of prosecution. Consequently, any grounds asserted in support of a motion for rehearing must come to grips with the propriety of the dismissal, given the background leading to such course of action, and make a showing of *diligence* in the prosecution of the action prior to that point. *W. J. Byrnes & Co., Inc., Crown Florist Supply et al.* v. *United States*,[1] 68 Cust. Ct. 358, C.R.D. 72–5 (1972). In its first motion for rehearing herein the importer wholly failed to undertake to exculpate itself from the taint of prosecutorial neglect, electing instead, by mere *statement*[2] in support of the motion, to assert the feasibility of consolidation of the dismissed action with an action then awaiting trial (R65/10806) and from which action the dismissed action was said to have been inadvertently disassociated. However, mere *feasibility*

[1] Counsel for the importer in C.R.D. 72-5 and the importer in the case at bar are one and the same.

[2] Rule 12.1(b) of the court rules required the submission of an affidavit setting forth in detail the supporting facts.

of prolongation of an action will not revive a dismissed action in the absence of the requisite exculpation from prosecutorial neglect. *W. J. Byrnes & Co., Inc.* v. *United States, supra.*

The affidavit of counsel submitted in support of the importer's second motion for rehearing does not exculpate the importer from the taint of prosecutorial neglect. Although attorney Tuttle's affidavit does not so indicate, the court's letter to counsel under date of June 13, 1978, expressly offered plaintiff-importer the opportunity to notice the case for trial or take other steps to dispose of it within a 30-day period as a means of obviating a dismissal of the action for lack of prosecution. And it was only after neither alternative to dismissal was pursued by counsel and no communication received by the court from counsel indicative of its interest in or of problems encountered in the prosecution of the action was the action dismissed by the court *sua sponte* on July 26, 1978, pursuant to rule 8.3(b)(3) adopted by the court subsequent to the enactment of the Customs Courts Act of 1970.

It is to be noted that rule 8.3(b)(3) which provides for dismissal of an action for lack of prosecution "[w]henever it shall appear that any * * * action is not being prosecuted with due diligence * * * " did not originate after the Customs Courts Act of 1970. The substance of this rule was contained in former rule 5(b) of the rules of the U.S. Customs Court, adopted April 25, 1949, as amended and in effect March 28, 1960, and applicable when this action was commenced in 1965 as a reappraisement appeal. Rule 5(b) authorized the court to dismiss an action for lack of prosecution "[w]henever it shall be made to appear to * * * this court * * * that the same is not being prosecuted with due diligence * * * ." And former rule 5(b) has been construed by our appeals court in *United States* v. *Chas. Kurz Co.*, 55 CCPA 107, C.A.D. 941 (1968) *in support of* the trial court's dismissal of an importer's reappraisement appeal as being a proper exercise of authority accorded to the court under the rule, and this, under factual circumstances where considerably less latitude and deference was given to the importer there in the handling of its overage appeal prior to dismissal than that accorded the importer by this court in the case at bar. In C.A.D. 941, the majority, speaking through Chief Judge Worley, said (p. 110):

> We find nothing in this record to hold that the trial judge acted arbitrarily or capriciously. On the contrary, we think his dismissal of the appeal was, on the record before us, consistent with the valid exercise of the authority with which rule 5(b) clothes all judges of the Customs Court in discharging their responsibilities.

The "due diligence" requirement of rule 8.3(b)(3) is a necessary safeguard against erosion of the court's authority under the rules to

foster sound management in the expeditious handling of its litigation business. And the court finds that insistence on the "due diligence" requirement in this case is salutary in the light of the history of the case.

The court's records reveal that since this case was started as a reappraisement appeal in 1965, it has appeared on the court's trial calendars a total of six times between March 29, 1966, when it was transferred to the San Francisco docket and September 17, 1968, when it was suspended under *City Lumber Co. and Port Everglades Steel Corp.* v. *United States*, R62/3973, inclusive of two occasions during which it was continued "peremptorily" and "For trial peremptorily" against the importer on September 12, 1967, and January 30, 1968, respectively. Thereafter, the case languished in suspension status for more than 4 years under R62/3973, until that case was finally resolved in the Government's favor in 1972. (See *City Lumber Co.* v. *United States*, 59 CCPA 89, C.A.D. 1045, 457 F. 2d 991 (1972).)

The subsequent filing of a complaint in the action in 1973 seems more the product of the importer's desire to avoid dismissal under rule 8.3(b)(2) than of its desire to prosecute the action, judged in the light of its ensuing inertia. In any event, the importer's posture in the instant motion manifests a continuing intention not to "prosecute" the action, but to arrest its "prosecution" through yet another vehicle of suspension. Under the circumstances attending this record the court deems it not in the best interests of efficient court administration to sanction the revival of an overage case which plaintiff wishes to place in deep slumber under yet another suspension.

Plaintiff's second motion for rehearing is denied.

(C.D. 4781)

WILD HEERBRUGG INSTRUMENTS, INC. *v.* UNITED STATES

Motion for rehearing

Court No. 72-2-00278

Port of New York

[Motion denied.]

Dated December 11, 1978

Barnes, Richardson & Colburn (*Richard C. King* and *Rufus E. Jarman, Jr.* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*William F. Atkin*, trial attorney), for the defendant.

RICHARDSON, Judge: In this action the Government moves for a rehearing of the decision in C.D. 4767 decided September 14, 1978, wherein the court held that the imported phototubes were properly classifiable as alternatively claimed under TSUS item 708.80 as mountings for compound optical microscopes. The Government contends that the court overlooked the fact that at the trial the importer abandoned all claims as to phototube numbered 256539, and that as to this phototube the judgment ought at least be modified so as to affirm the liquidated classification of that phototube under TSUS item 708.89.

The Government also contends that the court did not find it necessary to determine whether the phototubes were optical appliances and instruments within the meaning of item 708.89, but that it is necessary for the court to make such a determination as a predicate for determining that the tubes are mountings inasmuch as the terms "Optical appliances and instruments" and the terms "frames and mountings" are mutually exclusive terms. The Government further contends that the terms "frames and mountings" refer to articles which are nonoptical in nature.

The importer opposes the motion in part. The importer argues that all claims as to phototube 256542, and not phototube 256539 as the Government claims, were abandoned at the trial; and the importer does not oppose the Government's motion insofar as this phototube is concerned. As to all other phototubes, the importer argues that the presence of optical elements in an article does not preclude its classification as a mounting.

The threshold question at the trial was not whether claims affecting any of the phototubes had been abandoned. The question was whether a particular phototube was involved in the importations before the court. The colloquy between the court and counsel on the matter dealt with phototube numbered 256542 and not phototube numbered 256539 (R. 27). For the sake of expediency the importer was willing to waive any claims as to phototube 256542, and the Government's posture as manifest in its pleading was that no phototube with that number was imported.

An examination of all invoices supports the Government's pleading allegation. Since no phototube bearing number 256542 was ever imported under the entries at bar, it follows that no classification was ever made as to such a tube under these entries. Consequently, it would be inappropriate for the court to now modify its judgment herein to sustain a nonexistent classification merely because the importer waived any claim as to merchandise which was never imported or classified under the involved entries.

With respect to the other numbered phototubes actually imported and classified, it is implicit in the court's decision in C.D. 4767 that the court regarded the disputed phototubes as being by nature something less than a complete and functional end-use article which the terms "appliances" and "instruments" connote and, hence, that they are not, therefore, "Optical appliances and instruments" within the meaning of the superior heading to item 708.89. Thus, the court said in C.D. 4767, "* * * if the tube is *part* of any instrument * * * it is *part* of the host microscope." (Italics added.) And in this posture the court went on in the opinion to conclude "that these phototubes fall squarely within the ambit of the term 'mountings' for compound optical microscopes under item 708.80", it being apparent to the court that a compound optical microscope is a specific optical appliance or instrument.

With respect to the Government's contention that the terms "frames and mountings" refer exclusively to nonoptical articles, one searches its trial brief in vain for any statement indicative of such an argument. In fact, in its trial brief the Government argued to the contrary in its alternative posture. (See p. 36, defendant's brief, where it states: "* * * if the phototubes are not properly classified as optical appliances and instruments under item 708.89, they are properly classifiable as frames and mountings for compound optical microscopes under item 708.80, TSUS.") Also, arguments raised for the first time on rehearing are not properly before the court for consideration when prior opportunity existed during trial for the moving party to have adequately made its position known. *Lunham* v. *United States*, 1 Ct. Cust. Appls. 320, T.D. 31409 (1911).

For the reasons stated, defendant's motion for rehearing is denied in all respects.

DECISIONS OF THE UNITED STATES CUSTOMS COURT

Rules

(C.R.D. 78–9)

MITSUBISHI INTERNATIONAL CORPORATION *v.* UNITED STATES

Motion to dismiss for lack of jurisdiction—
Protest against penalty

Court No. 77–7–01146

[Motion denied.]

(Dated July 25, 1978)

Bogle & Gates (*David M. Salentine* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Sidney N. Weiss*, trial attorney), for the defendant.

Opinion and Order

WATSON, Judge: This action was commenced by a summons which states the underlying claim to be in part the "... improper use of penalty proceedings in rate/classification of dispute; failure to advise of grounds for penalty; assessment of penalty on basis of ground not stated." It has its origin in a lengthy protest filed on December 8, 1976 with the district director at Anchorage, Alaska in response to a notification by the district director dated September 10, 1976 that a demand for penalties in the amount of $618,130.19 was being mitigated to $33,073.00.

Defendant has moved to dismiss this action for lack of jurisdiction asserting that it is brought to challenge the imposition of a penalty, a matter which it claims is not within the subject matter jurisdiction of this court in that it is not a decision which can be protested under 19 U.S.C. § 1514(a).[1]

[1] 19 U.S.C. § 1514(a):

(a) ... decisions of the appropriate customs officer, including the legality of all orders and findings entering into the same, as to—

(1) the appraised value of merchandise;

(2) the classification and rate and amount of duties chargeable;

(3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury;

(4) the exclusion of merchandise from entry or delivery under any provision of the customs laws;

(5) the liquidation or reliquidation of an entry, or any modification thereof;

(6) the refusal to pay a claim for drawback; and

(7) the refusal to reliquidate an entry under section 1520(c) of this title,

shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Customs Court in accordance with section 2632 of Title 28 within the time prescribed by section 2631 of that title.

Plaintiff attempts to characterize the action as relating to classification, on the theory that by allegedly considering an alternative classification as a factor in his calculation of a reduced penalty the district director made a decision as to classification rather than as to a penalty.

It would appear however that once the administrative agency expresses its decision in the form of a penalty, that is the form with which plaintiff must contend. If, in the course of later consideration of this penalty, the agency takes into account other factors such as the proper classification of the importation, the dispute between the parties is not thereby transformed into a question of classification. Accordingly, for the purposes of this motion the court considers the protest underlying this action to have been made against a decision related to the imposition of a penalty.

The success of defendant's motion to dismiss therefore depends on the correctness of its asserted proposition that the decision which plaintiff protests is not one which may be protested pursuant to 19 U.S.C. § 1514(a). The court is of the opinion that this assertion is not established by the cases cited in its support by defendant. For this reason the motion is denied. The possibility that the decision to impose a penalty is a decision as to an exaction within the meaning of 19 U.S.C. § 1514(a)(3) remains open. The cases cited by the defendant do not foreclose such a possibility and the drastic result of dismissal should not be reached in the absence of a clear demonstration of lack of jurisdiction.

A close reading of *Sheldon & Co. et al.* v. *United States*, 8 Ct. Cust. Appls. 215, T.D. 37455 (1917) does not disclose a controlling result. In that case protests were made, *inter alia*, against the imposition of a fine representing 20% of the estimated duty on certain diamonds imported by mail. The court gave its primary attention to the question of whether the protests were filed in time, which depended on whether all the moneys demanded by the collector were duties or "some other form of monetary exaction." The court found that the moneys demanded by the collector were *not* duties. It then opined that *it was not necessary to decide whether the sum required was a fee, charge or exaction within the meaning of the relevant tariff act.* It stated further that "[c]onceding that the importers paid the money in satisfaction of a customs fee, charge, or exaction, then protest not having been filed within 15 days after such payment was too late, and from that it results the decision of the collector became final and conclusive against them."

After this dispositive discussion the court went on to develop an alternative, secondary analysis in which it considered that if the moneys received by the collector were in compromise of a threatened suit in forfeiture, then, since those suits were beyond the jurisdiction of the Board of General Appraisers (predecessor to this court) and

the appellate court, no relief could be granted the importers regarding the money paid in compromise or settlement.

It should be noted that the decision in *Sheldon* does not clearly dispose of the question of whether penalties are exactions within the meaning of the tariff acts, and even if the penalty involved therein was viewed as being outside the jurisdiction of the court, the result was reached because the penalty was a sum regarded as a compromise or settlement of a forfeiture proceeding, *a circumstance not present in this case.*

The case of *M. M. Scher & Sons, Inc.* v. *United States*, 24 Cust. Ct. 243, C.D. 1241 (1950) is also viewed as having no dispositive effect on the question before the court. Again the true ground of decision was the untimeliness of the protest, but to the extent the decision deals with the issue of penalty jurisdiction, it is opaque, confusing and probably mistaken in its perception that it was applying the holding of the *Sheldon* case.

In reality it expanded a point which was secondary and hypothetical to begin with far beyond its initial meaning. In *Sheldon* the thought was expressed as follows:

> If the moneys received by the collector were paid to him *as the representative of the United States attorney, or in compromise of a threatened suit in forfeiture* and not in satisfaction of duties or of a customs fee, charge, or exaction, then no relief can be granted the importers in this proceeding, inasmuch as *forfeitures and suits in forfeitures are beyond the jurisdiction of the Board of General Appraisers and of this Court.* In re Chichester (48 Fed., 281, 285–286). [Emphasis supplied.]

It is apparent that the penalty in *Sheldon* was considered as a payment made in connection with a suit in forfeiture or to obtain the release of the seized importation, and a penalty as a self-contained act, unrelated to release from seizure, or the commencement of forfeiture proceedings would not necessarily be considered in the same manner. The penalty in *Scher* was evidently not demanded under the same circumstances and should therefore not have been as closely linked to suits in forfeiture as it was.

Moreover, the controlling consideration in lack of jurisdiction over suits in forfeiture was "[t]he anomaly . . . of the board of general appraisers taking jurisdiction in a cause pending in a court of the United States for a forfeiture of goods, and deciding, as it were, finally the issues involved . . . ." *In re Chichester*, 48 F. 281, 284 (1891).

It hardly seems reasonable that this court, which is an Article III court of the United States, should find its jurisdiction limited by a theoretical discussion based on the lack of jurisdiction of a predecessor administrative tribunal vis-a-vis the then existing courts of the United States. In any event we are not dealing with suits in forfeiture but with what can be viewed as a suit contesting the denial of

a protest against an exaction within the meaning of 19 U.S.C. § 1514(a).

In treating a penalty exaction as if it were exactly the same as a forfeiture and in then relying on the hypothetical discussion in *Sheldon* as conclusive, the court in *Scher* extended the reasoning of the *Sheldon* case beyond its original premise, which was alternative and, in my view, unrelated to pure penalties to begin with.

The case of *C. J. Fendrick* v. *United States*, 71 Treas. Dec. 829, T.D. 48986 (1937) did not involve a penalty.

In *Border Brokerage Co. et al.* v. *United States*, 41 Cust. Ct. 49, C.D. 2020 (1958),[2] at pages 57–58, the development of a distinction between the laws regarding the levying of fines and penalties for violations of the customs laws and the laws governing determination of duties had nothing to do with the jurisdiction of the Customs Court. The distinction was made in order to make a point regarding the differences in burden of proof between reliquidations for fraud under section 521 of the Tariff Act of 1930 (in which the government has the burden of establishing the existence of fraud) and actions for the recovery of penalties (where the burden of proof is on the defendant). That case has no bearing on the question of whether the decision to impose a penalty may be protested under 19 U.S.C. § 1514(a).

The question posed here was not resolved in *Puget Sound Freight Lines et al.* v. *United States*, 36 CCPA 70, C.A.D. 400, 173 F. 2d 578 (1949). There the phrase ". . . all exactions of whatever character (within the jurisdiction of the Secretary of the Treasury)" was read as not intending to describe certain entry and clearance fees imposed on vessels, which fees were viewed as matters arising under the navigation laws and within the jurisdiction of the Secretary of Commerce. Penalties were not involved in that case and it would therefore be improper to place reliance on the later general discussion in that case of the jurisdictional boundaries of the Customs Court, the district courts, and the Court of Claims. This is particularly so in light of the court's emphasis in its analysis of Customs Court jurisdiction, on the connection of the fees and charges to the imported merchandise, a connection which certainly exists in the case of a penalty on the merchandise.

The case of *Carriso, Inc.* v. *United States*, 106 F. 2d 707 (9th Cir. 1939) is similarly distinguishable. I do not think it is too much to require that support for the proposition that this court does not have jurisdiction over protests against penalties should come from cases that deal with penalties *qua* penalties. A matter of this importance should not be controlled by cases lacking a direct and definite determination of this question and should not be established by analogy, inference or supposition.

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[2] *Rev'd*, 47 CCPA 75, C.A.D. 732 (1960).

The series of cases cited by the defendant as examples of instances in which suits involving forfeitures and penalties or questioning underlying forfeitures or penalties were brought in district courts do not shed any light on the question involved here.

Most of them involved the seizure by the government of vehicles used in violation of the law and attempts by interested parties to regain possession.[3] The conclusions of the courts in those cases that the courts do not have jurisdiction over the decision of the Secretary of the Treasury to deny the petitions for remission have no bearing on the question of whether judicial review may be obtained of a decision for which special provision may have been made in 19 U.S.C. §1514(a).

The mere fact that cases having some connection with penalties are brought in the district courts is not necessarily an indication that in other cases the Customs Court is an improper forum. It may well be that when the government is seeking to enforce the penalty it must use the district courts, but it does not follow that the importer seeking to challenge the decision to impose the penalty is similarly constrained. Again we return to the basic question of whether the statute granting the right to protest a decision as to an exaction encompasses decisions related to the imposition of a penalty.

The exclusivity of this court's jurisdiction (when it has subject matter jurisdiction) is not inconsistent in theory with the subject matter jurisdiction assertedly exercised by the district courts in the cases cited by defendant. This courts jurisdiction would remain exclusive, as it has always been, for those actions which arise from protestable decisions while the district courts would presumably remain the forum for judicial review of those decisions which are not protestable or for those cases in which the relief sought is not within the power of the Customs Court to grant.

For this and other reasons the remaining cases cited by defendant are distinguishable.

One Lot Emerald Cut Stones v. *United States*, 409 U.S. 232 (1972) deals with the question of whether a forfeiture may be accomplished by civil proceedings pursuant to 19 U.S.C. § 1497 following the owner's acquittal on a criminal charge of violating 18 U.S.C. § 545. The Supreme Court answered in the affirmative on the ground that the civil proceeding did not require proof of intent and was therefore unaffected by the lack of intent demonstrated by the acquittal on the criminal charge. At page 237 the court stated that section 1497 ". . . provides a reasonable form of liquidated damages for violation of the inspection provisions and serves to reimburse the Government for investigation and enforcement expenses."

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[3] *United States* v. *One 1961 Cadillac*, 337 F. 2d 730 (6th Cir. 1964); *United States* v. *One 1973 Mazicon Truck*, 365 F. Supp. 833 (N.D. Fla. 1973); *Bramble* v. *Kleindienst*, 357 F. Supp. 1028 (D. Col. 1973); *Jary Leasing Corp.* v. *United States*, 254 F. Supp. 157 (E.D.N.Y. 1966).

At best the *One Lot Emerald* case indicates, by its existence, that the government seeks enforcement of forfeitures in the district courts, and is accommodated there, none of which negates the existence of jurisdiction in the Customs Court when the importer seeks to challenge decisions relating to the imposition of a penalty.

Lee v. *Thornton*, 420 U.S. 139 (1975) has no connection to the question here at issue. In that action 19 U.S.C. §§ 1460 and 1618 were challenged insofar as they mandated procedures to effect forfeiture and remission or mitigation of penalties imposed after border patrol agents apprehended appellants and seized their vehicle when they entered the United States from Canada without passing through a customs station.

The Supreme Court ruled that it had no jurisdiction over appellants' claim to enjoin enforcement of the challenged provisions of the customs laws because the Tucker Act (28 U.S.C. § 1346(a)(2)), which was the asserted ground for jurisdiction below, did not empower the district court to grant injunctive or declaratory relief.

This is hardly the source of a rule that a penalty is not an exaction and may not be challenged in the Customs Court under appropriate circumstances. Moreover since the appellants were seeking a declaratory judgment, injunctive relief, mandamus relief and damages, none of which the Customs Court can provide, the bringing of action in the district court is not an indication of the lack of jurisdiction in the Customs Court in those instances when the relief sought is of the type available in the Customs Court. *See SCM Corporation* v. *United States* (*Brother International Corporation, Party-in-Interest*), 80 Cust. Ct. 226, C.R.D. 78–2 (1978).

Leiser v. *United States*, 234 F. 2d 648 (1st Cir. 1956) is factually interesting but without relevance to this dispute. There the granting of a motion for summary judgment in the government's libel proceeding against 532.33 carats of diamonds was affirmed because the person in possession of the diamonds was found to be "arriving" within the meaning of 19 U.S.C. §§ 1496 and 1498(a)(6) despite the fact that his arrival in the United States was the result of an unintended and unforeseen diversion of his airplane due to bad weather.

Sarkisian v. *United States*, 472 F. 2d 468 (10th Cir. 1973) was a legal tug of war over the seizure of certain jewelry. The government lost because it did not start forfeiture proceedings quickly enough. The opinion has no relevance to the jurisdictional question here involved.

In sum, none of the cases cited by defendant indicates the existence of a clearly established principle that decisions regarding the imposition of a penalty are not subject to protest under 19 U.S.C. § 1514. In addition, the defendant points to no statutory material or legislative history which would justify the dismissal it seeks.

Consequently the motion to dismiss is Denied.

(C.R.D. 78–10)

MICHELIN TIRE CORPORATION *v.* UNITED STATES

Opinion and order on defendant's motion for a protective order and various motions to intervene and objections to disclosure

Court No. 75–9–02467

[Motion for protective order granted; motions to intervene and objections to disclosure denied.]

(Dated July 25, 1978)

Windels, Marx, Davies & Ives (*Paul Windels, Jr.* and *John Y. Taggart* of counsel) for the plaintiff.

Barbara Allen Babcock, Benjamin R. Civiletti, Assistant Attorneys General (*David M. Cohen,* Chief, Customs Section, *George W. Calhoun* and *Edmund F. Schmidt,* trial attorneys), for the defendant.

Dickstein, Shapiro & Morin (*Kenneth L. Adams* of counsel) for Charles W. Colson.

Williams & Connolly (*Edward Bennet Williams* and *Michael E. Tigar* of counsel) for John B. Connally.

Whiteford, Hart, Carmody & Wilson (*Frank H. Strickler* of counsel) for Harry R. Haldeman.

Laurence Mead Higby, pro se.

James J. Bierbower for Jeb Stuart Magruder.

Nicholas S. McConnell for Kenneth Wells Parkinson.

WATSON, Judge: This action is presently in the pretrial discovery stage. It was brought to contest the denial by the government of a protest by Michelin Tire Corporation against the assessment of countervailing duties on importations of its radial tires from Canada.

One of plaintiff's claims is that the decision of the government to assess countervailing duties was improperly influenced by payments made by American tire manufacturers.

In connection with this claim the court, on June 3, 1977, ordered certain discovery which included materials in the possession of the government, which materials had been before the grand jury during the course of the grand jury investigation conducted by the Watergate Special Prosecution Force. In order to release those materials the government felt the need to seek the authorization of the District Court for the District of Columbia, under whose jurisdiction the grand juries had been convened. After allowing delays in compliance with its order this court, on May 9, 1978, ordered final compliance. On May 30, 1978 Chief Judge William B. Bryant of the District Court for the District of Columbia ordered the case, which the defendant had commenced to seek authorization, transferred to this court.

As a consequence this court now has before it certain matters which were pending in that action, chiefly, motions to intervene and objections to disclosure by persons whose documents or summaries thereof are contained in the grand jury materials and a protective order sought by the defendant to govern the use of the materials.

The objections to disclosure are based principally on the claim that plaintiffs have not demonstrated a compelling necessity or particularized need, which is the normal standard for allowing discovery of matters occurring before the grand jury under Rule 6(e) of the Federal Rules of Criminal Procedure. In addition, one objection is based on a claim that disclosure will violate attorney-client or attorney work-product privilege while another individual objection is based on an asserted agreement that the government was to return all materials following the conclusion of the grand jury investigations.

The court finds no justification for requiring a demonstration of particularized need or any other exceptional standard of discovery in this matter. Although there is somewhat of a dearth of authority in this area of the law there is a definite distinction made between discovery for the purpose of learning what occurred before the grand jury and discovery, for its own sake, of materials which were before the grand jury.

This distinction was clearly drawn by Judge Tauro in *Capital Indemnity Corp.* v. *First Minnesota Construction Co. et al.*, 405 F. Supp. 929 (D.C. Mass. 1975), when he allowed civil discovery of documents before the grand jury even though the grand jury proceedings were then in progress. In so doing he followed the opinion of the second circuit in *United States* v. *Interstate Dress Carriers, Inc.*, 280 F. 2d 52 (2d Cir. 1960) in which the court held that ". . . such inspection does not constitute a 'disclosure of matters occurring before the grand jury' proscribed by Rule 6(e)." 280 F. 2d at 53. The circuit court stated further that ". . . when testimony or data is sought for its own sake—for its intrinsic value in the furtherance of a lawful investigation—rather than to learn what took place before the grand jury, it is not a valid defense to disclosure that the same information was revealed to a grand jury or that the same documents had been, or were presently being, examined by a grand jury." 280 F. 2d at 54.

A similar distinction is found in *Philadelphia Electric Company, et al.* v. *Anaconda American Brass Company, et al.*, 41 F.R.D. 518 (E.D. Pa. 1967). In that case plaintiffs in a civil antitrust action were allowed to discover certain bills of particulars which had been furnished to defendants in the course of related criminal proceedings even though the bills may have, to some extent, reflected information supplied to the grand jury. *Cf. United States* v. *Saks & Co.*, 426 F. Supp. 812 (S.D.N.Y. 1976).

In this case the grand jury has long since concluded its work and the material sought has no direct connection with the content of its deliberations. Consequently the considerations weighing against disclosure are even weaker here than they were in the cases of *Capital Indemnity Corp.* v. *First Minnesota Construction Co., supra*, and *Philadelphia Electric Co.* v. *Anaconda American Brass Co., supra.*

The remaining objections as to attorney-client and work-product privilege are not advanced with sufficient particularity and support to warrant serious consideration.

In addition the court is satisfied that to the extent there was an agreement to return materials to one of the persons objecting, it has been complied with. What remains are only extracts or summaries which were not covered by the agreement and are properly discoverable.

It is therefore

ORDERED that the various pending motions to intervene and objections to disclosure be Denied.

The court is further of the opinion that because these materials are associated with events of recent notoriety which remain the focus of intense public interest and could become the object of injudicious use, they should be discovered within the confines of a protective order.

It is therefore ORDERED that:

The materials shall be delivered to the firm of Windels, Marx, Davies & Ives, Esqs. where they shall be received and safeguarded by John Y. Taggart, Esq. under such conditions as will insure compliance with this order.

Access to the materials and discussion thereof shall be limited to attorneys of Windels, Marx, Davies & Ives and attorneys for Michelin Tire Corporation who have hitherto been actively participating in the conduct of this action.

The materials may not be disclosed to, or discussed with, any other persons except as may be permitted upon further application to the court.

The materials shall be used only in this action.

The materials shall not be photocopied or otherwise reproduced except for the purpose of inclusion in a filing with the court. In that case the copying shall be done by an attorney whose access to the materials is authorized by this order. A full record of the appropriate details of such copyings shall be maintained. Any copies or documents containing copies made pursuant to this provision, which remain in the possession of the attorneys for plaintiff, shall be subject to all the provisions of this order.

The materials shall be returned to the defendant upon the completion of the proceedings in the Customs Court. During the pendency

of any appeal the plaintiff's attorneys shall continue to have access to the materials in accordance with the applicable provisions of this order.

The materials may be examined under the supervision of the Clerk of the Court by the authorized attorneys for plaintiff, prior to the delivery of the materials to the custody of plaintiff's attorneys.

Nothing in this order shall preclude further application by a party for modification of its terms nor is this order intended to affect disputes regarding discovery of these materials which may arise in other actions.

(C.R.D. 78–11)

RELIABLE CHEMICAL COMPANY *v.* UNITED STATES

Motion to dismiss for lack of jurisdiction—Motion for suspension

Court No. 76–2–00311

[Motions denied.]

(Dated July 26, 1978)

Ralph W. Kalish for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Velta A. Melnbrencis*, trial attorney), for the defendant.

Opinion and Order

WATSON, Judge: In response to plaintiff's motions to designate Court No. 73–10–02963 a test case and to suspend Court No. 76–2–00311 thereunder, defendant cross moved to dismiss the latter case for lack of jurisdiction.

Defendant's motion to dismiss is based on the asserted prematurity of the protest, a circumstance it has not demonstrated to the satisfaction of the court. Although the protest was filed on July 22, 1975 and the bulletin notice of liquidation was made on July 25, 1975, it appears that plaintiff, at the time of its protest, was already in possession of a notice of liquidation from defendant.

Defendant apparently sends out a notice prior to the date of the bulletin notice which it characterizes as a "courtesy" notice. The court views this notice (a blank copy of which is reproduced below) as being a notice of liquidation sufficient to be protested under 19 U.S.C. §1514 even though it is not the notice established by regulation in 19 C.F.R. 159.9 (1975) pursuant to 19 U.S.C. §1500.

As can be seen the notice is entitled "Notice of Entries Liquidated". It gives no direct indication that it is intended to be an advance, informal or courtesy notification. In its margin it states, "your entry was liquidated on the date indicated for the liquidated amount."

The mere fact that the date indicated was a future date does not overcome the dominant impression that the document is conveying notice of a decision already reached. In point of fact it *is* conveying that notice. It is simply not doing so in the form which defendant, in its regulations, establishes as the ordinary form of notice.

There is no shortage of cases holding that notice of liquidation must be given in the form and manner prescribed by the Secretary of the Treasury and that the regulations so prescribed have the force of law. But this principle was enunciated to decide disputes centered on the question of whether faulty attempts to conform to the regulations could accomplish a proper notice of liquidation. It did not contemplate the use of an alternative and self-sufficient form of notice, chosen by the Secretary of the Treasury.

It would be improper for defendant, having chosen this form of notice, to then fall back on its regulations and attack the natural, reasonable and diligent response of plaintiff as premature under the law and it would be unjust for a court to sanction such conduct.

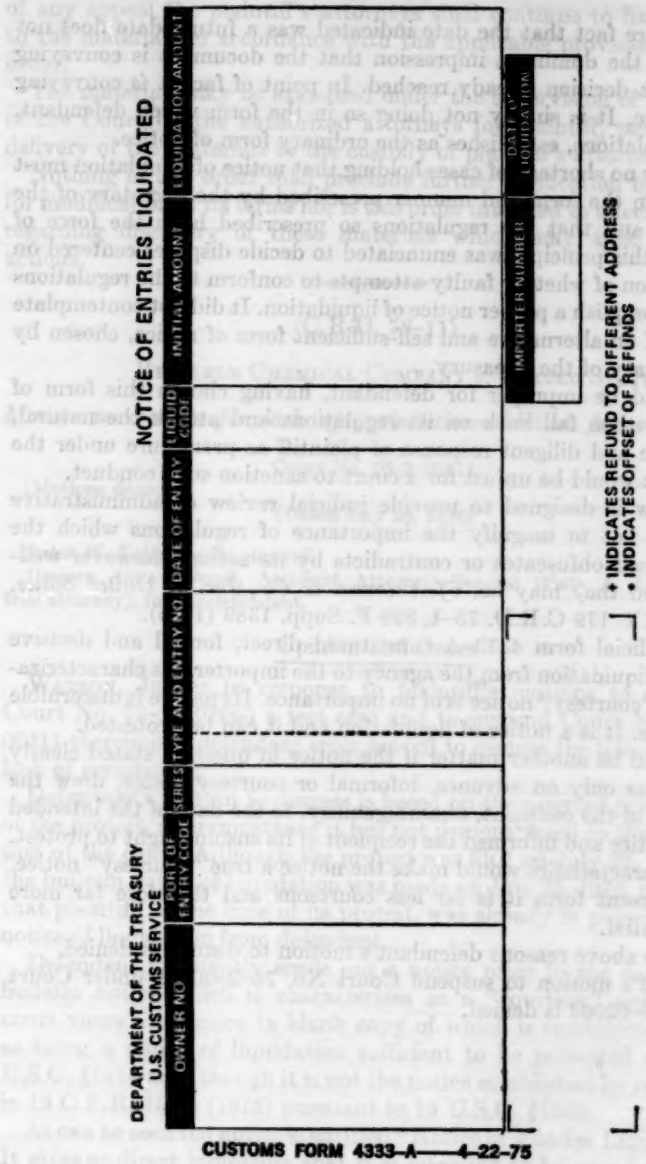
The law is designed to provide judicial review of administrative decisions, not to magnify the importance of regulations which the agency itself obfuscates or contradicts by its actions, however well-intentioned they may be. *Cf. Colonna & Co., Inc.* v. *United States*, 75 Cust. Ct. 179 C.R.D. 75-4, 399 F. Supp. 1389 (1975).

This official form 4333-A constituted direct, formal and decisive notice of liquidation from the agency to the importer. Its characterization as a "courtesy" notice is of no importance. Its nature is discernible on its face. It is a notice of liquidation and it can be protested.

It would be another matter if the notice in question stated clearly that it was only an advance, informal or courtesy notice, drew the attention of the recipient, unambiguously, to the date of the intended formal notice and informed the recipient of its ensuing right to protest. These characteristics would make the notice a true "courtesy" notice. In its present form it is far less courteous and therefore far more consequential.

For the above reasons defendant's motion to dismiss is denied.

Plaintiff's motion to suspend Court No. 76-2-00311 under Court No. 73-10-02963 is denied.


DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE
NOTICE OF ENTRIES LIQUIDATED
OWNER NO.
PORT OF ENTRY CODE
SERIES
TYPE AND ENTRY NO.
DATE OF ENTRY
LIQUID CODE
INITIAL AMOUNT
LIQUIDATION AMOUNT
DATE OF LIQUIDATION
IMPORTER NUMBER
+ INDICATES REFUND TO DIFFERENT ADDRESS
• INDICATES OFFSET OF REFUNDS
CUSTOMS FORM 4333-A——4-22-75
Your entry was liquidated on the date indicated for the liquidation amount. Any difference between this amount and the initial amount paid will be billed or refunded to you.

(C.R.D. 78-12)

MICHELIN TIRE CORPORATION *v.* UNITED STATES

Memorandum opinion and order on defendant's motion to limit the scope of trial and plaintiff's motion to place a burden of proof on defendant

Court No. 75-9-02467

[Motions denied.]

(Dated July 27, 1978)

Windels, Marx, Davies & Ives (*Paul Windels, Jr., John Y. Taggart* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*David M. Cohen*, Chief, Customs Section; *Edmund F. Schmidt*, trial attorney), for the defendant.

WATSON, Judge: This is an action brought pursuant to 28 U.S.C. § 2632 contesting the denial (under 19 U.S.C. § 1515) of protests filed in accordance with 19 U.S.C. § 1514. The protests were made against the imposition of countervailing duties on entries of tires imported by plaintiff from Canada.

At a pretrial conference the defendant took the position that in this action the court is limited to a review of the administrative record of the proceedings in which the Secretary of the Treasury decided to impose countervailing duties and further limited to deciding whether that decision was arbitrary or capricious. In addition a dispute was apparent as to which party had the burden of proof in this action. Accordingly, the court required the parties to address themselves to these matters in memorandums of law and is treating them as a motion by defendant to limit the scope of trial and a cross motion by plaintiff to place the initial burden of proof on the defendant.

The court is firmly of the opinion that the issue of the correctness of the decision to impose countervailing duties on these entries is subject to a complete trial on the merits without any limitation whatsoever. Defendant apparently looks on this action as being merely a review of whatever countervailing duty proceeding was conducted under 19 U.S.C. § 1303 and is therefore led into the error of presuming that it is governed by principles of judicial review of administrative actions.[1] In reality this action is governed by the normal standards of a trial on the merits as derived from the statutes related to the creation

[1] In any event plaintiff has made a persuasive argument that if indeed the scope of review embodied in the Administrative Procedure Act, 5 U.S.C. § 706, applied here, the circumstances would be such as would warrant the *de novo* review of 5 U.S.C. § 706(2)(F). *See* H.R. Rep. No. 1980, 79th Cong., 2d Sess., pp. 45-46.

of the cause of action, notably 19 U.S.C. § 1514 which reads in relevant part as follows:

> . . . [D]ecisions of the appropriate customs officer, including the legality of all orders and findings entering into the same, as to—
>
> . . . .
>
> (2) the classification and rate and amount of duties chargeable;
>
> (3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury;
>
> . . . .
>
> shall be final and conclusive . . . unless a civil action contesting the denial of a protest . . . is commenced in the United States Customs Court.

Thus, this court obtains its jurisdiction of this case by virtue of a statute which renders the entire substance and underpinning of the decision to assess duty subject to challenge in language of notable broadness.

The underlying decision of the Secretary of the Treasury to order the assessment of countervailing duties is subject to a full trial on the merits by virtue of its being an order or finding entering into the decision of the appropriate customs official to assess countervailing duties on the entries involved in this action. The correctness of the Secretary's decision is therefore *an issue* in the case not the direct objective of the action. It may be the ultimate focus of attention but it is not the inducer of the action and certainly not the determinant of its scope.

In other words, the original decision of the Secretary of the Treasury to impose countervailing duties could not be immediately challenged in court. Only when it was implemented in an assessment of duties on specific entries of merchandise did judicial review become available following the denial of the protest. Then a challenge to the decision to assess duties opens up all the underlying decisions to a full examination. In short, the purpose of the statutory scheme is not a judicial review of underlying administrative proceedings (although the court can examine all aspects of them if necessary) but a trial of issues raised in a challenge to a duty assessment.

Were this not enough, defendant has failed to cite a single case in this court in which the limitations it espouses were adopted.

Turning to the matter of the burden of proof in this action the relevant statute is 28 U.S.C. § 2635(a) which provides as follows:

> In any matter in the Customs Court:
>
> (a) The decision of the Secretary of the Treasury, or his delegate, is presumed to be correct. The burden to prove otherwise shall rest upon the party challenging a decision.

Plaintiff asserts that an initial burden ought to be placed on the defendant to establish facts which would support the imposition of

the countervailing duties. Plaintiff argues that this would be proper because the defendant allegedly has not adequately disclosed the factual basis on which its decision was based, committed manifest legal error, and was otherwise improperly motivated.

The court is not persuaded that plaintiff has demonstrated, in its arguments, the propriety of modifying the burden of proof expressed in the statute. Consequently the resolution of the matters raised in its arguments must await that time when plaintiff advances proof directed to overcoming the presumption of correctness. The cross motion itself must be denied.

In light of the above it is hereby

ORDERED that defendant's motion to limit the scope of trial be denied, and it is further

ORDERED that plaintiff's motion to place a burden of proof on defendant be denied.

(C.R.D. 78-13)

SCM CORPORATION *v.* UNITED STATES (Brother International Corporation, PARTY-IN-INTEREST)

International Trade Commission—
Antidumping Act—Determination of Injury

Court No. 77-4-00553

(Dated August 9, 1978)

Stewart & Ikenson (*Frederick L. Ikenson* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*David M. Cohen*, Chief, Customs Section, and *Glenn E. Harris*, trial attorney), for the defendant.

Tanaka, Walders & Ritger (*H. William Tanaka, Lawrence R. Walders* and *Wesley K. Caine* of counsel) for the party-in-interest.

RE, Chief Judge: This is an action by an American manufacturer brought pursuant to section 516(c) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516(c) (Supp. V 1975). Plaintiff, SCM Corporation, seeks to review the failure of the Secretary of the Treasury to assess dumping duties upon the importation from Japan of portable electric typewriters.

Specifically, plaintiff challenges the United States International Trade Commission's (ITC) determination in its Investigation AA1921-145, that an industry in the United States was not being or likely to be injured, or prevented from being established, by reason of portable electric typewriters from Japan sold at less than fair value within the meaning of the Antidumping Act of 1921, as amended, 19 U.S.C. § 160 et seq. (1970 & Supp. V 1975). This negative injury determination is the subject of this litigation. See *SCM Corporation*

v. *United States* (*Brother International Corporation, Party-in-Interest*), 80 Cust. Ct. 226, C.R.D. 78–2, 450 F. Supp. 1178 (1978), which denied plaintiff's motion to dismiss for lack of subject matter jurisdiction.

The action is presently before this court on (1) the plaintiff's motion to compel discovery, and production of documents and things which comprise the entire record made before the ITC in the antidumping investigation; (2) the defendant's cross-motion for a protective order, and to be relieved from responding to plaintiff's discovery and motion to produce; and (3) the party in interest's cross-motion for a protective order.

Plaintiff initiated its discovery by serving on the defendant and the party in interest, interrogatories and a request to identify and produce all documents and things which comprise the entire record made before the Commission.

Defendant responded to plaintiff's discovery by categorizing and identifying all of the documents and things it claimed were in the files of the Commission, or individual Commissioner, at the time of the injury determination. It did not produce any of the requested items, but stated specific reasons for not producing them. Defendant also identified six groups of documents or things, three of which the plaintiff does not contest the failure to produce. Plaintiff nevertheless demands all other documents identified in defendant's response, as well as all documents which are part of the record of the Commission.

In its initial response, the defendant disclaimed the term "record" as applied to the ITC investigation, but later amended its response by producing a copy of the notice of investigation and hearing issued March 28, 1975; a copy of the notice of investigation and hearing of March 28, 1975 as published in the Federal Register on April 3, 1975 (40 Fed. Reg. 15013); and a determination of no injury or likelihood of injury in Investigation AA1921–145 under the Antidumping Act of 1921, as amended, USITC publication 732 dated June 19, 1975; and the determination and statement of reasons as published in the Federal Register (40 Fed. Reg. 27079).

In sum, the defendant's refusal to produce certain documents and request for protective order is based upon the belief that the requested materials are not relevant for the purpose of judicial review, and that the information was given to the ITC in confidence and upon the assumption that the confidence would be preserved.

Thus, the parties present several issues with respect to the permissible scope of discovery of materials submitted to the ITC, the extent to which those materials may be subjected to a protective order, and the scope of judicial review of the administrative action. In similar cases, *Pasco Terminals, Inc.* v. *United States*, 80 Cust. Ct. 249, C.R.D. 78–3 (1978) and *Armstrong Bros. Tool Co. et al.* v.

United States (*Daido Corporation, Steelcraft Tools Division, Party-in-Interest*), 80 Cust. Ct. 252, C.R.D. 78-5 (1978), this court ordered that ITC submit a certified copy of the transcript of proceedings, exhibits introduced before the Commission, certified copies of written submissions, questionnaires, reports, and all other documents and things in the file of the Commission relating to the investigation. It also ordered that a motion for a protective order respecting any documents or things that were submitted to the Commission on a confidential basis, or otherwise privileged, would be considered after receipt of the materials in court. As stated in the *Pasco Terminals* case, the basis of the order is "to enable the court to determine whether or not the Commission's finding of injury was, among other things, arbitrary, an abuse of discretion, or otherwise contrary to law." See 5 U.S.C. § 706 (2)(A)(1976). See also *Camp* v. *Pitts*, 411 U.S. 138 (1973); *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971); *Imbert Imports, Inc.* v. *United States*, 60 CCPA 123, 475 F. 2d 1189 (1973); *Suwannee Steamship Company* v. *United States*, 79 Cust. Ct 19, 435 F. Supp. 389 (1977), and cases cited therein. Cf. *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975). See also questions and answers attached to the letter of Chairman Daniel Minchew, United States International Trade Commission, November 16, 1977, reproduced in *Hearing Before the Subcommittee on Trade, House Committee on Ways and Means, on the Adequacy and the Administration of the Antidumping Act of 1921* (95th Cong., 1st Sess. 1977) pp. 65–66.

In view of the foregoing, and upon consideration of all other proceedings herein, it is hereby

ORDERED that plaintiff's motion be denied, and that the Secretary of the United States International Trade Commission, Mr. Kenneth R. Mason, shall prepare and transmit to Mr. Joseph E. Lombardi, Clerk of the United States Customs Court, on or before September 15, 1978, the following:

(1) A certified copy of the transcript of proceedings and all exhibits introduced before the Commission in its Investigation AA1921–145;

(2) Certified copies of all written submissions, questionnaires, reports and all other documents which relate to Investigation AA1921–145;

(3) All other things in the files of the Commission relating to the investigation. *Pasco Terminals, Inc.* v. *United States, supra; Armstrong Bros. Tool Co. et al.* v. *United States* (*Daido Corporation, Steelcraft Tools Division, Party-in-Interest*), *supra*, and it is further,

ORDERED that the defendant's and the party in interest's cross-motions for protective orders shall be denied without prejudice subject to renewal as to any documents or things that were received by the Commission on a confidential basis, or that are otherwise privileged.

(C.R.D. 78–14)

ARMSTRONG BROS. TOOL CO. ET AL.

v.

UNITED STATES (GREAT NECK SAW MANUFACTURING, INCORPORATED, PARTY-IN-INTEREST)

Plaintiff's motion for rehearing granted

Court No. 77–8–02004

Port of New York

(Dated August 16, 1978)

Stewart & Ikenson (*Frederick L. Ikenson* of counsel) for the plaintiffs.
Barbara Allen Babcock, Assistant Attorney General (*Joseph I. Liebman* and *William F. Atkin*, trial attorneys), for the defendant.

ORDER

NEWMAN, Judge.

Upon reading and filing plaintiffs' motion for rehearing or reconsideration, together with their memorandum in support thereof, and defendant's response thereto, and upon all other papers and proceedings had herein, it is hereby

ORDERED, ADJUDGED AND DECREED that plaintiffs' motion for rehearing or reconsideration be, and the same is, granted; and it is further

ORDERED, ADJUDGED AND DECREED that that portion of this court's order on defendant's motion to strike entered on June 15, 1978 (C.D. 4751), directing that plaintiffs' action be dismissed in part be, and the same is, vacated.

(C.R.D. 78–15)

G. M. RUBBER INDUSTRIES, INC. *v.* UNITED STATES

On Plaintiff's Motion and Defendant's Cross-Motion for Summary Judgment

Court No. 75–5–01099

Port of San Juan

[Motions denied.]

(Decided September 21, 1978)

Siegel, Mandell & Davidson (*Herbert T. Posner* of counsel) for the plaintiff.
Barbara Allen Babcock, Assistant Attorney General (*Sidney N. Weiss*, trial attorney), for the defendant.

MALETZ, Judge: This action, which is before the court on cross-motions for summary judgment, involves the dutiable status of merchandise described on the commercial invoices as rubber overshoes, style Nos. 110 and 310 imported from Brazil by plaintiff, and entered at the port of San Juan during the period March 1973–January 1974. The merchandise was classified by the government under item 700.52 of the Tariff Schedules of the United States (TSUS) as footwear of rubber or plastics, the uppers of which do not extend above the ankle, and assessed duty at the rate of 25 percent ad valorem. Plaintiff challenges this classification and claims the importations are properly classifiable as "Articles not specially provided for, of rubber or plastics: Other," under item 774.60, dutiable at 8.5 percent ad valorem.

The pertinent provisions of TSUS read as follows:

Classified under:		
	Footwear (whether or not described elsewhere in this subpart) which is over 50 percent by weight of rubber or plastics or over 50 percent by weight of fibers and rubber or plastics with at least 10 percent by weight being rubber or plastics:	
	Hunting boots, galoshes, rainwear, and other footwear designed to be worn over, or in lieu of, other footwear as a protection against water, oil, grease, or chemicals or cold or inclement weather, all the foregoing having soles and uppers of which over 90 percent of the exterior surface area is rubber or plastics (except footwear with uppers of nonmolded construction formed by sewing the parts thereof together and having exposed on the outer surface a substantial portion of functional stitching):	
*	* * * * * * *	
700.52	Footwear (except footwear provided for in item 700.51), the uppers of which do not extend above the ankle, designed for use without closures, whether or not supported or lined	25% ad val.
Claimed under:		
	Articles not specially provided for, of rubber or plastics:	
*	* * * * * * *	
774.60	Other	8.5% ad val.
*	* * * * * * *	

Plaintiff alleges there are no genuine issues to be tried with respect to the following material facts: (1) That the imported merchandise is used in the manufacture of "The Ice Gripper," which is an article of rubber footwear designed for safer walking on ice and packed snow; (2) that the sample attached to an affidavit and report of one of plaintiff's affiants is similar in all material respects to the imported merchandise; (3) that the merchandise in its imported condition cannot be worn as a "rubber" as it possesses very little traction, thereby rendering it unsafe for the wearer; (4) that the imported merchandise is never sold or offered for sale in its imported condition; (5) that after importation a mineral grit is applied to the sole and is affixed thereto with a rubber adhesive; (6) that the cost of the grit and its application to the imported merchandise after importation exceeds the value of the imported merchandise; and (7) that the merchandise as imported is in chief value of rubber.

Defendant agrees that the merchandise as imported is in chief value of rubber. It alleges that there are no genuine issues to be tried with respect to the following material facts: (1) That in its condition as imported the merchandise is designed to be worn over other footwear and is designed to protect the shoe over which it is worn from water, oil, grease, chemicals, and inclement weather; (2) that the merchandise is marketable as an overshoe, whether or not it is sold in its imported condition, and is therefore of a class or kind of articles chiefly worn over other shoes as protection from water, oil, grease, chemicals, and inclement weather; (3) that the imported merchandise in all entries is identical to the pair of overshoes tagged "CE 902148—7/19/73, style No. 110, summons No. 75–5–01099, 5/9/75, protest No. 49094000039, 8/19/74"; (4) that the imported merchandise responded to the term "footwear" at the time of its importation, since it possesses the essential characteristics of "footwear" of the overshoe type used as a protection against water, oil, grease, chemicals, and inclement weather; and (5) that post-importation improvements in the traction characteristics of the imported footwear, if there were any, are immaterial as the merchandise was already footwear before such alleged improvements were made. Finally, defendant asserts there is a genuine dispute as to the specific traction and construction of the imported merchandise.

Upon considering the affidavits presented by the parties and the supporting exhibits, the court must conclude that genuine issues of material fact exist which require a trial. For example, the record is not clear as to what merchandise was actually imported. Thus, the court is unable to determine the nature and characteristics of the importations in issue. See, e.g., *L. B. Watson Co., a/c Murphy Reir, Inc.* v. *United States*, 75 Cust. Ct. 185, 187, C.R.D. 75–5 (1975). Further, there appears from the conflicting affidavits of the parties

genuine issues of fact as to, among other things, (1) whether or not the imported merchandise can, in its condition as imported, be worn as a "rubber" or overshoe; (2) whether or not at the time of importation the merchandise is marketable as an overshoe; and (3) the specific traction and construction of the imported merchandise.

Since triable issues of fact exist, both plaintiff's motion for summary judgment and defendant's cross-motion for summary judgment are denied. See, e.g., *Fortune Star Products Corp.* v. *United States*, 78 Cust. Ct. 184, C.R.D. 77-3 (1977).

(C.R.D. 78-16)

H. E. LAUFFER CO., INC. *v.* UNITED STATES

Plaintiff's motion for consolidation denied

Court Nos. 73-9-02702-S, 74-4-00885-S and 74-9-02410-S

Port of New York

(Dated October 23, 1978)

Murray Sklaroff for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Glenn E. Harris*, trial attorney), for the defendant.

RICHARDSON, Judge: The importer moves for an order consolidating civil actions bearing court Nos. 73-9-02702-S, 74-4-00885-S, and 74-9-02410-S. In support of the motion the importer states that it wishes to address the question as to whether the filing of multiple protests against the same category of merchandise is involved in these three severed actions, and to that end, will file a complaint presenting this question if the court grants the motion and orders consolidation of the actions.

The Government opposes the motion, contending that the question which the importer seeks to litigate by way of a consolidated action, namely, the filing of multiple protests against the same category of merchandise, is not common to all of the entries covered by protests in these actions, pointing out that while the issue of multiple protests exists with respect to all entries and protests in 73-9-02702-S, that such is not the case with respect to 74-4-00885-S and 74-9-02410-S which have other issues as well. In the light of these circumstances, the Government argues that the importer has not shown in what respects consolidation of these actions would avoid *unnecessary expense or delay;* and further, suggests that consolidation here would tend to invite difficulties and complexities which the importer has not addressed itself to on the motion.

Although under rule 10.3(a) of the Customs Court rules the court may order consolidation of claims in two or more actions, as distinguished from consolidation of the actions themselves, the granting of such relief must, nevertheless, be premised under the rule upon a finding that *unnecessary expense or delay* would not be caused thereby. Since the moving papers do not address themselves to this aspect of the matter, the court has no basis for satisfying itself that *unnecessary expense or delay* will not result from a consolidation of a single claim or issue in these actions in the absence of pleadings defining and articulating all of the litigable issues presented therein.

Plaintiff's motion to consolidate is denied, without prejudice, however, to renewal after joinder of issue in these three severed actions.

(C.R.D. 78–17)

F. J. Strauss Co., Inc. *v.* United States

Golf Sets—Toys

Summary Judgment

Where there are material differences as to relevant facts, the right to a full scale trial of the facts should not be summarily cut off by a motion for summary judgment. *The American Greiner Electronic, Inc.* v. *United States*, 77 Cust. Ct. 164, C.R.D. 76–9 (1976) and cases therein cited.

Court Nos. 73–9–02557, 74–3–00750 and 74–10–02961

Ports of New York and San Francisco

[Motion for summary judgment denied.]

(Dated November 15, 1978)

Serko & Simon (*Richard Haroian* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Susan Handler-Menahem*, trial attorney), for the defendant.

Landis, Judge: In this action, plaintiff has filed a motion for summary judgment asking that its claim be sustained that the imported merchandise, junior golf sets, is properly classifiable as other golf equipment and parts, under TSUS item 734.77.

Customs had classified the merchandise as toys and parts of toys under TSUS item 737.90. The defendant in opposing plaintiff's motion for summary judgment points out that plaintiff, contrary to rule 8.2(b) of this court, has not annexed to its motion for summary judgment a statement of material facts as to which there is no genuine issue for trial, and urges that significant factual matters divide the parties and

that therefore summary judgment should be denied. I uphold the defendant's position.

In addition to plaintiff's failure to comply with this court's rules, as aforesaid, it is noted that the crux of plaintiff's case appears to be that the imported golf sets come within the "junior edition" principle. One of the cases relied on by plaintiff is *United States* v. *Field & Co.*, 12 Ct. Cust. Appls. 543, T.D. 40738 (1925) wherein tenpins and ninepins had been classified as toys. The predecessor of this court held [1] that the merchandise was more properly classifiable under section 1402 of the Tariff Act of 1922 as " * * * all other balls, of whatever material composed, * * * designed for use in physical exercise or in any indoor or outdoor game or sport, and all clubs, rackets, bats, or other equipment, such as is ordinarily used in conjunction therewith in exercise or play." The Court of Customs Appeals in affirming the judgment that the merchandise was not "toys" wrote:

> It is apparent from the description of the dimensions of the pins and balls that the articles are not mere playthings. They are of sufficient size to require that they be used in the playing of the game for which they were designed in order to afford amusement to children. These articles may be said, figuratively speaking, to be "junior editions" of like articles used by adults in the playing of the game of "tenpins" or "ninepins" rather than miniatures of such articles, so small as to be unfitted for use as ninepins or tenpins, and intended to be used and actually used only as mere playthings for the amusement of children. [12 Ct. Cust. Appls. 545.]

The Court continued (p. 545):

> *The undisputed evidence* establishes that the imported merchandise is used by children in the playing of a game known as "tenpins" or "ninepins." * * * [Italics added.]

The critical words are the emphasized first three. In the case at bar, no evidence at all has been adduced. This shortcoming plagues all of plaintiff's comparisons to decided decisions.

In plaintiff's cited case of *Mego Corp.* v. *United States*, 75 Cust. Ct. 108, C.D. 4614, 405 F. Supp. 1088, *appeal dismissed*, 63 CCPA 125 (1975), it is true the question facing the court was the classification of "junior" baseball gloves and boxing gloves. While the court did uphold the "junior edition" principle, some witnesses testified and many exhibits were introduced. Here, there simply is no such record on which I may rely. Similarly, plaintiff's cited case of *New York Merchandise Co., Inc.* v. *United States*, 62 Cust. Ct. 38, C.D. 3671, 294 F. Supp. 971, *appeal dismissed*, 56 CCPA 133 (1969), was not

[1] *Marshall Field & Co.* v. *United States*, 45 Treas. Dec. 726, T.D. 40243—G.A. 8813 (1924).

submitted on a motion for summary judgment. Furthermore, defendant in its answer has specifically denied paragraphs 6 and 7 of plaintiff's complaint wherein it is alleged the articles are "junior edition" golf sets and that the articles are suitable for use by children in a regular or organized game of golf.

As defendant has stated: "A question of fact remains as to whether the merchandise in issue is of such quality and character as is ordinarily used in the serious pursuit of the game of golf, and whether such is suitable for use in organized play of golf."

See also *The American Greiner Electronic, Inc.* v. *United States*, 77 Cust. Ct. 164, 166, C.R.D. 76–9 (1976), wherein on a summary judgment motion it was stated: "Since there are material differences between plaintiff and defendant with respect to relevant facts, * * * defendant should not be summarily cut off from its right to a full scale trial of the facts."

For all these reasons, plaintiff's motion for summary judgment should be denied. The case should be calendared for trial.

Plaintiff's motion for summary judgment is denied.

(C.R.D. 78–18)

SPRAGUE ELECTRIC COMPANY *v.* UNITED STATES (CAPAR COMPONENTS CORP., PARTY-IN-INTEREST)

Opinion and Order on Defendant's Motion for a Protective Order

Court No. 77–9–03056

[Motion granted as to seven documents; ITC ordered to transmit eighth document to court for in camera inspection; defendant's request to file immediate appeal denied.]

(Dated December 27, 1978)

Stewart & Ikenson (*Eugene L. Stewart* and *Frederick L. Ikenson* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Joseph I. Liebman* and *William F. Atkin*, trial attorneys), for the defendant.

NEWMAN, Judge: Defendant has again filed a motion for a protective order in this case respecting certain documents in the files of the International Trade Commission (ITC) sought by plaintiff, and in this connection defendant has now interposed a claim of executive privilege. That evidentiary privilege, which has been frequently encountered by the Federal courts in various disputes arising out of discovery, has taken on a paramount significance in this court in light of the expansion of our jurisdiction to review determinations of the Secretary of the Treasury and the ITC by the Trade Act of 1974 (Public Law No. 93–618, 88 Stat. 2052 (1975).

I

Defendant's motion is presented in the following context: This is an American manufacturer's action brought by plaintiff pursuant to 28 U.S.C. 1582 (b)(1970), 28 U.S.C. 2632(a) (Supp. V, 1975) and 19 U.S.C. 1516(c) (Supp. V, 1975) contesting the negative injury determination of ITC in investigation AA 1921–159 under the Antidumping Act of 1921, as amended (19 U.S.C. 160 et seq. (1970 and Supp. V, 1975) 41 F.R. 47604–07 (1976).[1] That investigation involved tantalum electrolytic fixed capacitors exported from Japan. Heretofore, in the course of discovery, plaintiff served upon defendant a second set of interrogatories and a second request for production of "All documents and things in the files of the International Trade Commission and/or individual Commissioners, pertaining to the Commission Investigation No. AA1921–159, involving "Tantalum Electrolytic Fixed Capacitors from Japan," which investigation was the basis for the Commission's negative injury determination challenged in this action. Defendant thereupon moved for a protective order seeking to be relieved from responding to plaintiff's second set of interrogatories and second request for production grounded upon its theory of the scope and standard of review applicable to ITC injury determinations. By its prior motion, defendant sought to prohibit plaintiff from conducting discovery into matters beyond the Commission's notice of investigation and hearing (41 F.R. 33337–38 (1976)), the Commission's negative injury determination and its statement of reasons (41 F.R. 47604–07 (1976)).

On June 27, 1978, I entered an order denying defendant's prior motion for a protective order and requiring that Kenneth R. Mason, Secretary of the ITC, prepare and transmit to Joseph E. Lombardi, clerk of the U.S. Customs Court, on or before July 28, 1978, the following: (1) A certified copy of the transcript of proceedings and exhibits introduced before the Commission in investigation AA1921–159; (2) certified copies of all written submissions, questionnaires, reports, and all other documents relating to investigation AA1921–159; and (3) all other things in the files of the Commission relating to the investigation. The order of June 27, 1978, further provided that denial of defendant's then motion for a protective order was without prejudice to renewal respecting any documents or things that were received by the Commission on a confidential basis or are otherwise privileged. The predicate of my prior order was "to enable the court to determine whether

[1] The jurisdictional uncertainty surrounding this action at the time issue was joined has been recently resolved in *SCM Corporation* v. *United States* (Brother International Corp., party-in-interest), 80 Cust. Ct. 226, C.R.D. 78-2 (1978), wherein Chief Judge Re held that the Customs Court has jurisdiction to review a negative injury determination by the Commission in an American manufacturer's action pursuant to 19 U.S.C. 1516(c). See also my recent opinion in *Armstrong Bros. Tool Co. et al.* v. *United States* (Great Neck Saw Manufacturing, Inc., party-in-interest), 80 Cust. Ct. 160, C.D. 4751 (1978), modified on rehearing, 81 Cust. Ct. 162, C.R.D. 78-14 (1978), following the rationale of *SCM*.

or not the Commission's finding of injury was, among other things, arbitrary, an abuse of discretion, or otherwise contrary to law." *Sprague Electric Company* v. *United States* (Capar Components Corp., party-in-interest, 80 Cust. Ct. 256, 257, C.R.D. 78–7 (1978).

In conformance with the order of June 27, 1978, and a "Stipulation for Protective Order" approved on July 31, 1978, numerous "public" and "confidential" documents have been transmitted by the Secretary of the Commission to the clerk of this court. Defendant, however, now seeks to relieve the Secretary of the ITC from transmitting to the court, pursuant to the order, seven documents and a portion of one other document based upon a claim of executive privilege as formally asserted in an affidavit (with an annexed exhibit A) by Joseph O. Parker, Chairman of the ITC. These disputed documents are encompassed within the order of June 27, 1978, and thus defendant seeks a modification of that order. Alternatively, defendant seeks leave to proceed by way of an immediate appeal to the Court of Customs and Patent Appeals under 28 U.S.C. 1541(b) (1976) [2] in the event that its present motion for a protective order is not granted.

II

As noted above, defendant's present motion rests upon executive privilege formally asserted in an affidavit executed by Chairman Parker.[3] Plaintiff contends that the claim of privilege has not been properly invoked by defendant because the Chairman of ITC is not the "head" of the Commission, and consequently cannot speak for that body as a whole. Hence, we first address the issue of whether the Chairman of the ITC can properly claim executive privilege on behalf of the Commission.

In *Smith* v. *F.T.C.*, 403 F. Supp. 1000 (D. Del. 1975), an analogous issue was raised by plaintiffs as to whether the Chairman of the Federal Trade Commission is the "head" of that Commission for purposes of asserting executive privilege claims. In holding for the Commission, the court articulated the following rationale (403 F. Supp. at 1016, n.48):

> Plaintiffs have challenged whether the Chairman of the FTC is the "head" of the Commission for purposes of asserting ex-

[2] 28 U.S.C. 1541(b) provides:

When the chief judge of the Customs Court issues an order under the provisions of section 256(b) of this title, or when any judge in the Customs Court, in issuing any other interlocutory order, includes in the order a statement that a controlling question of law is involved as to which there is substantial ground for difference of opinion and that an immediate appeal from its order may materially advance the ultimate termination of the litigation, the Court of Customs and Patent Appeals may, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order * * *.

[3] "A close reading of cases where claims of executive privilege were raised indicates that the necessary facts have generally been required to be raised by affidavit." *Smith* v. *F.T.C.*, 403 F. Supp. 1000, 1016 (D. Del. 1975).

ecutive privilege claims with arguments that the Chairman is not able to act on behalf of the Commission as a whole. The Court finds this argument to be unpersuasive because neoliteral compliance with the requirement that an agency head act in this context is unnecessary. That requirement was designed to deter governmental units from too freely claiming a privilege that is not to be lightly invoked, *U.S.* v. *Reynolds*, *supra* [345 U.S. 1, 7–8 (1953)], by assuring that someone in a position of high authority could examine the materials involved from a vantage point involving both expertise and an overview-type perspective. It is impossible to suggest that allowing the FTC Chairman to raise these claims will undermine the purposes behind this requirement.

Here, it must be recognized that Chairman Parker is the chief administrative officer of the ITC.[4] Paraphrasing the *Smith* holding, Chairman Parker is "someone in a position of high authority [who] could examine the materials involved from a vantage point involving both expertise and an overview-type perspective." Plainly, then, the rationale adopted by the Court in *Smith* concerning the Chairman of the FTC is fully applicable here to the Chairman of the ITC. Within the doctrine of *United States* v. *Reynolds*, 345 U.S. 1, 7–8 (1953), the Chairman of the ITC is clearly the "head" of the Commission for purposes of asserting a claim of executive privilege, and such claim was properly made by him in this case on behalf of the Commission. See also *Kerr* v. *United States District Court*, 511 F. 2d 192, 198 (9th Cir. 1975) (by implication), aff'd, 426 U.S. 394 (1976).

III

Having determined that the claim of executive privilege was properly asserted by the Chairman of the ITC, we turn to the question of whether defendant's claim is applicable under the circumstances in this case. True it is that a governmental agency cannot bend the law to its will. And furthermore, there is no question that the judiciary has the power to review the decision of an agency or department head to withhold production of documents under a claim of privilege, and to determine whether such claim should be upheld or overruled. *United States* v. *Nixon*, 418 U.S. 683, 705 (1974); *Committee for Nuclear Responsibility, Inc.* v. *Seaborg*, 149 U.S. App. D.C. 385, 463 F. 2d 788, 793 (1971); *Machin* v. *Zuckert*, 114 U.S. App. D.C. 335, 316 F. 2d 336, 341 (1963), *cert. denied*, 375 U.S. 896 (1963); *Sun Oil Co.* v. *United States*, 514 F. 2d 1020, 1023 (Ct. Cl. 1975); *Kaiser Aluminum & Chemical Corp.* v. *United States*, 157 F. Supp. 939, 947 (Ct. Cl. 1958); *Kinoy* v. *Mitchell*, 67 F.R.D. 1, 7 (S.D.N.Y. 1975); *O'Keefe* v. *Boeing Co.*, 38 F.R.D. 329, 334 (S.D.N.Y. 1965).

[4] See 19 U.S.C. 1331(a) (1976), as amended by Public Law 95-106, 91 Stat. 808 (1977).

In support of a formal claim of executive privilege, there must be "a specific designation and description of the documents" claimed to be privileged. *Black* v. *Sheraton Corp. of America*, 371 F. Supp. 97, 101 (D.D.C. 1974). Such designation and description "is necessary in order that a court be able to make a knowledgeable decision as to whether any document or portion thereof actually contains advisory or deliberative materials." *Smith* v. *F.T.C.*, 403 F. Supp. at 1016. In our case, exhibit A attached to Chairman Parker's affidavit specifically designates and describes each of the eight documents embraced by defendant's claim of executive privilege as follows:

Document *Description*

a. An undated three-page "pros and cons" statement prepared by the Commission's staff for the use of Commissioners in arriving at the Commission's injury determination with regard to tantalum capacitors from Japan. This statement sets forth suggested criteria to be used as well as possible reasons for and against an affirmative injury determination. The document contains staff advice and alternative views and recommendations as to injury or likelihood of injury to the domestic industry.

b. An undated six-page draft opinion entitled "Statement of Reasons for a Determination of No Injury or Likelihood Thereof" prepared by the Commission's staff for the consideration of, and use by, the Commissioners in arriving at their statements of reasons, with hand-written modifications made by, or at the direction of, individual Commissioners. The document contains staff advice, conclusions, deliberations, opinions, and recommendations as well as tangible evidence of Commissioners' thought processes (in the case of the hand-written modifications).

c. An undated five-page draft opinion entitled "Statement of Reasons for Negative Determinations of Commissioners Will E. Leonard, Daniel Minchew, George M. Moore, Catherine Bedell, and Italo H. Ablondi" prepared by the Commission's staff for the consideration of, and use by, Commissioners in arriving at their statements of reasons. The document contains staff advice, conclusions, deliberations, opinions, and recommendations.

d. An undated seven-page draft opinion entitled "Statement of Reasons for Negative Determination of Chairman Will E. Leonard, Vice Chairman Daniel Minchew, and Commissioners George M. Moore, Catherine Bedell, and Italo Ablondi" prepared by the Commission's staff for the consideration of, and use by, the Commissioners in arriving at their statements of reasons, with hand-written modifications made by, or at the direction of, individual Commissioners. The document contains staff advice, conclusions, deliberations, opinions, and recommendations as well as tangible evidence of Commissioners' thought processes (in the case of the hand-written modifications).

e. An undated eight-page draft opinion entitled "Statement of Reasons for Affirmative Determination of Commissioner Joseph O. Parker" prepared by Commissioner Parker and his legal assistant for the exclusive consideration of, and use by, Commissioner Parker in arriving at his statement of reasons, with hand-written modifications made by, or at the direction of, Commissioner Parker. The document contains advice, conclusions, deliberations, opinions, and recommendations as well as tangible evidence of a Commissioner's thought processes (in the case of the hand-written modifications).

f. A one-page internal memorandum, dated October 5, 1976, from John Byrne of the Accounting Division to Harold Graves of the Metals Division setting forth arguments for and against an affirmative injury determination.

g. A two-page undated hand-written original of the typed memorandum referred to in f.

h. A one-page internal memorandum, dated June 13, 1977, from N. A. Lynch, Director of Industries, to R. A. Cornell, Deputy Director, Office of Operations, concerning erroneous import statistics. Privilege is invoked only as to that portion of the second paragraph of the memorandum which contains advice, characterization, and opinion regarding import statistics and their use.

Paragraphs 5 through 8 of Chairman Parker's affidavit recite the reasons for the claim of executive privilege, as follows:

5. All of the documents listed in exhibit A consist wholly of internal communications which were prepared by members of the Commission's staff solely for their own use and/or the use of Commissioners or other staff members, and which were never circulated or disclosed to outsiders. These documents set forth and reflect advisory opinions, conclusions, considerations, deliberations, and recommendations, and comprise part of the process by which the Commission's decisions are formulated and its official duties and responsibilities are discharged. The opinions and recommendations expressed in the documents may not reflect the ultimate views or position of the Commission or of individual Commissioners.

6. I believe free and frank discussion within the Commission to be an essential part of the decision-making process. To be effective, however, confidential communications, recommendations, views, and advisory opinions, such as are contained in the documents listed in Exhibit A, must remain immune from public disclosure.

7. In my judgment, the effective functioning of the Commission requires that the confidentiality of the advice, characterization and opinion in the second paragraph of document h and of the whole of document a through g be preserved. If these documents were disclosed, I believe the Commission's staff would be less candid in offering advice in the future, with resultant harm to the policy of open and frank discussion heretofore followed within the Commission. As a result, crucial decisions might be

made with insufficient knowledge or inadequate advice. Additionally, disclosure of the hand-written modifications in documents b, d, and e would amount to an inappropriate probing of the methods by which individual Commissioners arrive at their decisions.

8. Since disclosure of the documents specified in Exhibit A would impair the free flow of advisory opinions, arguments, conclusions, considerations, deliberations, and recommendations within the Commission and thus adversely affect the public interest, I, as Chairman of the Commission, respectfully assert a formal claim of privilege as to those documents.

IV

The thrust of defendant's position is that the above-described documents comprise (wholly or partly) intra-governmental advice, opinions, and recommendations for which an evidentiary privilege exists "so as to preserve the confidentiality of certain advice and/or evidence of the mental processes of Government personnel, including the Commissioners of the U.S. International Trade Commission, proferred [sic] during the course of the administrative proceedings in this case." Defendant's memorandum, at 2.

It is well established by a long line of decisions that the executive branch is privileged to withhold disclosure of intra-governmental documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions are formulated. *EPA* v. *Mink*, 410 U.S. 73, 86–87 (1973); *Securities and Exchange Commission* v. *National Student Marketing Corp.*, 179 U.S. App. D.C. 56, 538 F. 2d 404 (1976); *United States* v. *Berrigan*, 482 F. 2d 171, 181 (3d Cir. 1973); *Smith* v. *F.T.C.*, 403 F. Supp. at 1014, et seq.; *Committee for Nuclear Responsibility* v. *Seaborg*, 463 F. 2d at 792; *Boeing Airplane Co.* v. *Coggeshall*, 108 U.S. App. D.C. 106, 280 F. 2d 654, 660 (1960); *Kaiser Aluminum & Chemical Corp.* v. *United States*, *supra*; *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318 (D.D.C. 1966), aff'd sub nom. *V.E.B. Carl Zeiss, Jena* v. *Clark*, 128 U.S. App. D.C. 10, 384 F. 2d 979 (1967), cert. denied, 389 U.S. 952 (1967); *Union Oil Co. of California* v. *Morton*, 56 F.R.D. 643 (C.D. Cal. 1972); *Verrazzano Trading Corp.* v. *United States*, 70 Cust. Ct. 347, 350, C.R.D. 73–9 (1973). Cf. 5 U.S.C. 552(b)(5) (1976); *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132 (1975).

The basis for the executive privilege asserted here by defendant was succinctly stated in *Smith* v. *F.T.C.*, *supra*, at 1015:

> * * * The purpose behind the executive privilege against disclosure of intra-agency advisory communications is the encouragement of frank discussion within the government as regards the formulation of policy. *U.S.* v. *Berrigan*, 482 F. 2d 171, 181 (3d

Cir. 1973). This is because "human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances * * * to the detriment of the decision-making process." *U.S.* v. *Nixon*, 418 U.S. 683, 705, 94 S. Ct. 3090, 3106, 41 L. Ed. 2d 1039 (1974). *Accord, Ackerly* v. *Ley*, 137 U.S. App. D.C. 133, 420 F. 2d 1336, 1341 (1969) ("there are enough incentives as it is for playing it safe and listing with the wind"). See also, *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 95 S. Ct. 1504, 44 L. Ed. 2d 29 (1975).

An additional policy reason for preserving the confidentiality of intra-governmental opinions and deliberations is expressed in *Zeiss*, *supra*, at 325–26:

> As important as are these considerations, the cases, analyzed critically, demonstrate that the immunity of intra-governmental opinions and deliberations also rests upon another policy of equal vitality and scope. *The judiciary, the courts declare, is not authorized "to probe the mental processes" of an executive or administrative officer.* This salutary rule forecloses investigation into the methods by which a decision is reached, the matters considered, the contributing influences, or the role played by the work of others—results demanded by exigencies of the most imperative character. No judge could tolerate an inquisition into the elements comprising his decision—indeed "[s]uch an examination of a judge would be destructive of judicial responsibility"—and by the same token "the integrity of the administrative process must be equally respected." Identically potent reasons dictate that protection no less extensive be afforded the processes by which the Attorney General's responsibilities for decisional and policy formulations, legal or otherwise, are discharged. [Italics supplied.]

Continuing, the court stated (p. 326):

> Inextricably intertwined, both in purpose and objective, are these two principles. The rule immunizing intra-governmental advice safeguards free expression by eliminating the possibility of outside examination as an inhibiting factor, but expressions assisting the reaching of a decision are part of the decision-making process. Similarly, the so-called "mental process rule" impresses the stamp of secrecy more directly upon the decision than upon the advice, but it extends to all phases of the decision-making process, of which the advice is a part. Each rule complements the other, and in combination they operate to preserve the integrity of the deliberative process itself. It is evident that to demand pre-decision data is at once to probe and imperil that process. [Footnotes omitted.]

Moreover, the genesis of executive privilege is based upon "the constitutional principle of separation of powers." *United States* v. *Berrigan*, 482 F. 2d at 181; *Black* v. *Sheraton Corp. of America*, 371 F. Supp. at 100 (D.D.C. 1974).

As we have seen, the Chairman of the ITC has formally asserted executive privilege with respect to specifically identified documents

prepared by the Commission's staff that comprised part of the decision-making process. In *KFC National Management Corp.* v. *National Labor Relations Board*, 497 F. 2d 298, 304–05 (2d Cir. 1974), the second circuit—reviewing an unfair labor practice decision of the NLRB (which decision is "quasi-judicial" in nature, unlike an ITC injury determination)—cogently alluded to the "work product of such decision-making processes" as follows:

> Thus what emerges from the *Morgan* [5] quartet is the principle that those legally responsible for a decision must in fact make it, *but that their method of doing so—their thought processes, their reliance on their staffs—is largely beyond judicial scrutiny.*
>
> This court and many others have consistently relied on *Morgan* to uphold the use of hearing examiners in developing evidence and forming preliminary decisions, the reliance on staff assistants for recommendations and draft opinions, and a variety of other procedures designed to apprise those legally responsible for administrative decisions with the critical issues and evidence in a case and to record their individual determinations. *Concomitantly, the courts have consistently refused to issue subpoenas for the work product of such decision-making processes: Staff memos, expert reports, preliminary drafts, the oral testimony of the decision makers as to the basis for their opinions—all have been held to be beyond the purview of the contesting parties and the reviewing courts.* [Footnotes omitted. Italics supplied.]

The draft opinions and "pros and cons" statements sought by plaintiff (documents "a" through "g" in exhibit A)[6] comprise essentially intra-agency advisory opinions and recommendations by the Commission's staff, and were an integral part of the Commission's deliberative process. Thus, these opinions and statements fit squarely within the concept of executive privilege as enunciated in the above-cited cases.[7] In the process of making injury determinations and other decisions within the scope of its authority, it is undoubtedly in the public interest that the Commission and its staff must necessarily feel free to explore various alternatives on a confidential basis. As pointed up in *Kaiser Aluminum*, 157 F. Supp. at 945–46:

> * * * Free and open comments on the advantages and disadvantages of a proposed course of governmental management would be adversely affected if the civil servant or executive assistant were compelled by publicity to bear the blame for errors or bad judgment properly chargeable to the responsible individual with power to decide and act. Government from its nature has necessarily been granted a certain freedom from control beyond that given the citizen. It is true that it now submits itself to suit but it must retain privileges for the good of all.

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[5] See *United States* v. *Morgan*, 313 U.S. 409 (1941) (*Morgan* IV).

[6] Documents "f" and "g", setting forth arguments "for and against" an affirmative injury determination, are treated the same as the "pros and cons" statement ,document "a".

[7] Document "h" will be considered infra.

> There is a public policy involved in this claim of privilege for this advisory opinion—the policy of open, frank discussion between subordinate and chief concerning administrative action.

In sum, it is not the function of this court "to probe the mental processes" of the ITC or its individual Commissioners in reaching the negative injury determination challenged by plaintiff in this action. Cf. *United States* v. *Morgan*, 313 U.S. 409, 422 (1941).

V.

The ruling on defendant's motion respecting documents "a" through "g" would be apparent on the basis of what has been discussed thus far, but for one significant circumstance. The doctrine of executive privilege is not absolute, but is qualified. *Smith* v. *F.T.C.*, 403 F. Supp. at 1015; *Black* v. *Sheraton Corp. of America*, 371 F. Supp. at 100; *Kaiser Aluminum & Chemical Corp.* v. *United States*, 157 F. Supp. at 946. As stressed by the Court in *Black* (at 100):

> * * * Recognition of the claim [of executive privilege] requires *a delicate balancing of competing interests;* the public's interest in preserving confidentiality to promote open communication necessary for an orderly functioning of the government, and the individual's need for disclosure of particular information. *The question at the core of any claim of executive privilege is whether the damage resulting from disclosure outweighs the need for a just resolution of a legal dispute.* [Italics supplied.]

Again, in *Smith* v. *F.T.C.*, *supra*, the court enunciated the concept of "balancing" as follows (403 F. Supp. at 1015):

> * * * While the exact showing necessary to surmount a governmental claim of privilege is unclear [footnote omitted], what is basically involved in each case is an *ad hoc* balancing of individual need for the materials against the harm resulting from any such disclosure. * * *

See also: *Nixon, supra; Sun Oil Co., supra; Union Oil Co., supra; Committee for Nuclear Responsibility, supra.*

We now consider the fundamental question of whether plaintiff has demonstrated a need for the disputed documents which outweighs the harm that disclosure may do to intra-governmental candor. A "delicate balancing of competing interests," of course, cannot be accomplished so as to achieve a result having the invariance of a precise mathematical equation.

Filtered to its essentials, the first need advanced by plaintiff for production of the documents involved herein is to obtain the facts. Executive privilege, of course, does not apply to purely factual data prepared for intra- or inter-office use which would not compromise military or state secrets. *EPA* v. *Mink*, 410 U.S. at 87–88; *Verrazzano Trading Corp.* v. *United States*, 70 Cust. Ct. at 350–52. Even factual

material included in deliberative memoranda has generally been held discoverable if susceptible to severance from its context. *See Smith v. F.T.C.*, 403 F. Supp. at 1015, and cases cited.

But nothing appearing in plaintiff's memorandum is persuasive that disclosure of the draft opinions and "pros and cons" statements is essential for obtaining the facts. It is emphasized that 130 "public" and 107 "confidential" documents have already been transmitted to the court by the Commission pursuant to the order of June 27, 1978, and the "Stipulation for Protective Order" approved on July 31, 1978.[8] The within motion for a protective order covers but seven documents, and a portion of one other,[9] which are claimed by defendant to comprise advisory opinions and recommendations falling within the purview of executive privilege. Significantly, plaintiff's memorandum is devoid of any showing that the documents already furnished or otherwise accessible have not supplied the factual data which plaintiff requires.

Zeiss involved a somewhat analogous situation. There, the court found that the parties seeking to subpoena certain documents from the files of the Department of Justice, for which a claim of executive privilege was asserted by the Attorney General, had failed to demonstrate need for production overbalancing the interests protected by the privilege. It appears there that the Government had produced approximately 4,500 documents and claimed executive privilege as to 49 others. In essence, the Attorney General's affidavit recited (a) that the documents withheld comprised intra-departmental memoranda and inter-departmental communications containing opinions, recommendations, and deliberations pertaining to decisions the Department was required to make; and (b) the Attorney General's conclusion, following personal examination, that their production would be contrary to the public interest.

In sustaining the Government's claim of executive privilege, the court expressed this rationale (40 F.R.D. at 327–28):

> Approximately 4,500 documents have already been furnished the claimants; those which have not been total only 49. While the issue at bar is not to be resolved by numbers alone, the sharp contrast between the data that have been produced and those that have not is quite revealing. The claimants have had access to all of the Government's communications with outsiders, as well as to nearly all intra-governmental materials, and the items withheld are all internal papers. Thus there could remain no unseen document primarily attesting the Government's relations with third persons. *More importantly, what are retained are intra-*

[8] The motion papers do not state the precise number of these "public" and "confidential" documents. An examination by the Court reveals that these figures are indicated on the lists transmitted by the Secretary of the ITC. These documents fill two large cartons, and several are quite bulky and extensive in nature.

[9] Defendant asserts that only a portion of the second paragraph of document "h" is privileged.

departmental memoranda and inter-departmental communications composed wholly of opinions, recommendations and deliberations relating to legal and other determinations. There is an obvious distinction, in terms of necessity for inspection, between documents of this character and those which contain facts.

While examination of the contested papers is not to be denied simply because they are secondary rather than primary sources, the size and diversification of the production already made raises great doubt as to what additional informational tendencies they could have. * * *

The claimants' presentation is also devoid of a showing that the papers already furnished have not supplied the great bulk of the information for which the claimants earlier professed a need. Nothing appears that would make illogical the assumption that, the number and diversification of these documents considered, fresh non-governmental sources of information were indicated by exploration of which, through deposition or otherwise, additional information could be developed. There is nothing beyond sheer speculation to even hint that the information the retained communications drew upon as the basis for the opinions and recommendations expressed does not appear or is not discoverable from the mass of data the claimants now possess. *Necessity for production is sharply reduced where an available alternative for obtaining the desired evidence has not been explored.* [Italics supplied. Footnotes omitted.]

In *Kaiser Aluminum*, plaintiff brought an action against the Government for breach of a most favored purchaser clause in a contract for the sale of war plants to plaintiff. Plaintiff moved for production of a document containing an advisory opinion on intra-office policy concerning the sales of the plants, and a claim of executive privilege from discovery was asserted by the General Services Administration. In sustaining the Government's claim of privilege, the Court of Claims stated as the linchpin of its decision (157 F. Supp. at 946–47):

* * * The document sought here was a part of the administrative reasoning process that reached the conclusion embodied in the contracts with Kaiser and Reynolds. *The objective facts, such as the cost, condition, efficiency, terms and suitability are otherwise available.* So far as disclosure of confidential intra-agency advisory opinions is concerned, we conclude that they belong to that class of governmental documents that are privileged from inspection as against public interest but not absolutely. It is necessary therefore to consider the circumstances around the demand for this document in order to determine whether or not its production is injurious to the consultative functions of government that the privilege of non-disclosure protects.

We have spoken of the broad coverage of the plaintiff's request. While this is not the attorney-client privilege, the demand for this document seeks to lay bare the discussion and methods of reasoning of public officials. The fact that the author is dead is immaterial here. It is not a privilege to protect the official but one to protect free discussion of prospective operations and

policy. This goes beyond the disclosure of primary facts upon which conclusions are based. It is akin to the request for "production of written statements and mental impressions contained in the files and the mind of the attorney," which are unprotected by the attorney-client privilege. Cf. *Hickman* v. *Taylor*, *supra*, 329 U.S. at page 509, 67 S. Ct. at page 392. *Nothing is alleged by Kaiser, through the affidavit of its negotiating Vice President, Mr. Calhoun, or otherwise, to suggest any need for production of the document to establish facts.* [Italics supplied.]

Under the totality of the circumstances in this case, I do not find an "overbalancing" need by plaintiff for the draft opinions and "pros and cons" statements to establish the facts.

VI

Plaintiff further contends that because of the voluminous administrative record in this case, the draft opinions and "pros and cons" statements may help to focus on the facts and documents thought (by the Government) to be most significant. It is apparant from this flawed contention that plaintiff seeks the draft opinions and "pros and cons" statements as indicia of the elements or considerations which entered into the Commission's deliberative process. Use of the draft opinions and "pros and cons" statements for that purpose "would clearly violate the established rule * * * forbidding investigation into the processes by which decisions and policies are formulated". *Zeiss*, 40 F.R.D. at 329. And Cf. *Rosee* v. *Board of Trade*, 36 F.R.D. 684, 689 (N.D. Ill. 1965), wherein the court stated: "[T]he cerebrations and mental processes of government officials, leading to admittedly proper exercises of power, can never be a factor in a judicial proceeding and, therefore, need not be disclosed".[10]

The nub of the matter is, that after applying the "delicate balancing concept, plaintiff's showing of need for the draft opinions and "pros and cons" statements does not "overcome" the Commission's substantial showing of need for confidentiality embraced within the principle of qualified privilege afforded advisory opinions and recommendations.

VII

We now turn to plaintiff's suggestion that the disputed documents be transmitted to the court for an "in camera" inspection.

A

Where discovery is resisted, as in the instant case, courts frequently examine documents in camera in order to determine whether they should be held in a confidential status or be disclosed to the party seeking production. See *United States* v. *Nixon*, 418 U.S. at

[10] *Rosee* was cited on another point by the Supreme Court in *EPA* v. *Mink*, 410 U.S. 73, 88 (1973).

714–16; *EPA* v. *Mink*, 410 U.S. at 88 and cases cited; *Pasco Terminals, Inc.* v. *United States*, 80 Cust. Ct. 249, C.R.D. 78–3 (1978); *Verrazzano Trading Corp.* v. *United States*, 69 Cust. Ct. 307, 314, C.R.D. 72–19, 349 F. Supp. 1401 (1972); *Sun Oil Co.* v. *United States*, 514 F. 2d at 1024–25. Confidentiality is not diminished by in camera inspection. *Nixon*, 418 U.S. at 706. However, in camera inspection is not to be utilized in every case as a matter of course. In this connection, the Supreme Court definitively admonished, in *EPA*, 410 U.S. at 92–94:

> * * * As was said in *Kaiser Aluminum & Chemical Corp.*, 141 Ct. Cl. at 50, 157 F. Supp. at 947: "It seems * * * obvious that the very purpose of the privilege, the encouragement of open expression of opinion as to governmental policy is somewhat impaired by a requirement to submit the evidence even [*in camera*]." Plainly, in some situations, *in camera* inspection will be necessary and appropriate. But it need not be automatic. An agency should be given the opportunity, by means of detailed affidavits or oral testimony, to establish to the satisfaction of the District Court that the documents sought fall clearly beyond the range of material that would be available to a private party in litigation with the agency. The burden is, of course, on the agency resisting disclosure, 5 U.S.C. § 552(a)(3), and if it fails to meet its burden without *in camera* inspection, the District Court may order such inspection. But the agency may demonstrate, by surrounding circumstances, that particular documents are purely advisory and contain no separable, factual information. A representative document of those sought may be selected for *in camera* inspection. And, of course, the agency may itself disclose the factual portions of the contested documents and attempt to show, again by circumstances, that the excised portions constitute the barebones of protected matter. In short, *in camera* inspection of all documents is not a necessary or inevitable tool in every case. Others are available. Cf. *United States* v. *Reynolds*, 345 U.S. 1 (1953). In the present case, the petitioners proceeded on the theory that all of the nine documents were exempt from disclosure in their entirety under Exemption 5 by virtue of their use in the decisionmaking process. On remand, petitioners are entitled to attempt to demonstrate the propriety of withholding any documents, or portions thereof, by means short of submitting them for *in camera* inspection.

Thus, in *Kaiser Aluminum* (cited with approval by the Supreme Court in *EPA*, *supra*) the Court of Claims refused to make an in camera inspection of a document containing an intra-agency advisory opinion because of plaintiff's failure to make a definite showing of necessity; and in this connection the court commented (157 F. Supp. at 947–48):

> * * * To require it [examination of the privileged document] here would mean the creation of an absolute right for judicial examination and determination of all evidence whose discovery the executive deemed contrary to he public interest. If executive

determination is to be merely preliminary, the officer and agency most aware of the needs of government and most cognizant with the circumstances surrounding the legal claim will have to yield determination to another officer less well equipped. Circumstances may require such a course. This should not be ordered without definite showing by plaintiff of facts indicating reasonable cause for requiring such a submission.

The *Zeiss* court similarly declined to make an in camera inspection, and defined the circumstances under which such inspection would be appropriate (40 F.R.D. at 331–32):

> *In camera* inspection in executive privilege cases is appropriate where it appears with reasonable clarity that the party seeking production is entitled to access to some of the materials demanded. Examination in this type of situation enables the separation of what should be disclosed from what should not be revealed. Again, it may be that the balance between competing needs for confidentiality and disclosure cannot be made without analysis of the disputed data. Here the inspection enables the weighing to be done in the privacy of the judge's chambers. In each situation, however, a need, actual or potential, for production adequately appears, and the examination affords the means for fulfilling that need.
>
> That no such occasion is presented in this case is amply demonstrated, without plowing old ground, by brief reference to previous discussion. *The claimants have not shown that they are or could be entitled to the documents the Government still retains. The Government, on the other hand, has made a substantial showing that everything that is withheld falls well within the scope and protection of the privilege, and it satisfactorily appears that the balance on disclosure or secrecy is decidedly in its favor.* It is clear, too, that the claimants' projected investigation into the Government's decisional and deliberative processes is legally impermissible, and the circumstances rather plainly suggest that they have alternatives they might utilize to obtain that to which they may be entitled. Here inspection can satisfy no need for separation, for there appears nothing to separate; nor any need for balancing, with apparently nothing here to be weighed. [Footnotes omitted. Italics supplied.]

See also: *Committee for Nuclear Responsibility, Inc.* v. *Seaborg, supra; Walled Lake Door Co.* v. *United States*, 31 F.R.D. 258 (E.D. Mich. 1962).

B

As previously noted, the Chairman of the Commission has submitted an affidavit describing the content of the documents claimed to be privileged. Plaintiff, however, insists that the Court should not rely exclusively upon the Chairman's characterization of the documents, but should conduct an in camera inspection. In connection with utilizing in camera inspection to verify the accuracy of an

affidavit claiming executive privilege, the court observed in *Zeiss*, at 332:

> The claimants, however, contend for an *in camera* inspection for purposes of verifying that the content of the documents withheld is what the Government says it is. But to require examination here for that reason alone would mean not only an utter disregard for the affidavit of an executive with Cabinet status, but also "the creation of an absolute right for judicial examination and determination of all evidence whose discovery the executive deemed contrary to the public interest." The necessity the moving party must show is considerably more than a demand that someone other than his adversary look at the materials in question to make certain that statements as to their character are accurate. [Footnotes omitted.]

Hence, following the foregoing reasoning, I find no necessity in the present case for examining in camera documents "a" through "g" for the purpose of verifying the accuracy of the descriptions set forth in exhibit A of the affidavit submitted by defendant.

C

However, a different situation is presented in document "h", described in exhibit A of Chairman Parker's affidavit as a "memorandum * * * concerning erroneous import statistics," for which the Chairman invokes a claim of executive privilege "only as to that portion of the second paragraph of the memorandum which contains advice, characterization, and opinion regarding import statistics and their use". Exhibit A of the Parker affidavit.

In *Zeiss*, the court noted (40 F.R.D. at 332, n. 61) that in certain cases where the courts utilized the in camera inspection procedure for determining claims of executive privilege, "it appeared, before the inspection was ordered, that the claimant was entitled to some amount of discovery", and it was necessary to separate the privileged and unprivileged materials. Here, plaintiff concededly is entitled to a severable, but undelineated, portion of the second paragraph of document "h". It is, obviously, for the court and not the Chairman of the ITC to decide what portion of the second paragraph is or is not privileged. Cf. *Machin* v. *Zuckert*, 316 F. 2d at 341. Consequently, I shall make an in camera inspection of document "h" before reaching and determining the claim of privilege as to that document. Indeed, there can be no doubt of the propriety of such in camera inspection. *Kerr* v. *United States District Court*, 426 U.S. 394 (1976); *United States* v. *Nixon*, 418 U.S. at 706; *Sun Oil Co.* v. *United States*, 514 F. 2d at 1024; *Committee for Nuclear Responsibility, Inc.* v. *Seaborg*, 463 F. 2d at 792, 794; *Boeing Airplane Co.* v. *Coggeshall*, 280 F. 2d at 662; *Smith* v. *F.T.C.*, 403 F. Supp. at 1018; *O'Keefe* v. *Boeing Co.*, 38 F.R.D.

at 336; *United States* v. *Certain Parcels of Land*, 15 F.R.D. 224, 231 (S.D. Cal. 1954).

After careful consideration of defendant's present motion for a protective order and its alternative request for permission to appeal, and its memorandum and affidavit in support thereof, plaintiff's memorandum in opposition thereto, and all other papers and proceedings had herein, it is hereby ORDERED:

1. That defendant's motion for a protective order is granted with respect to documents "a" through "g" described in exhibit A annexed to the affidavit of the Chairman of the ITC.

2. That the Secretary of the ITC is relieved from the requirement to transmit to the clerk of the court documents "a" through "g" described in exhibit A annexed to the affidavit of the Chairman of the ITC.

3. That within thirty (30) days of the entry of this order, the Secretary of the ITC shall prepare and transmit under seal to Joseph E. Lombardi, clerk of the U.S. Customs Court, two certified copies of document "h" described in said exhibit A, for which a claim of executive privilege has been made by the Chairman of the ITC respecting a portion of the second paragraph of the document. One certified copy shall be in complete and unexpurgated form; the second copy shall have excised therefrom the portion of the second paragraph which defendant claims comprises privileged matter.

4. That document "h" shall be inspected by the court in camera for the purpose of considering defendant's claim of executive privilege, and determining whether the excised portion of the second paragraph of the document comprises privileged matter which should not be disclosed to plaintiff.

5. That this court's order of June 27, 1978, is modified in accordance with the foregoing paragraphs.

6. Defendant's alternative request to file an immediate appeal from this order pursuant to 28 U.S.C. 1541(b) is denied.

280-263—79——13

ABSTRACTS OF CUSTOMS COURT DECISIONS

Protests

The following abstracts of decisions of the United States Customs Court at New York are published for the information and guidance of officers of the customs and others concerned.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P78/82	Maletz, J. July 7, 1978	American Laubscher Corp.	68/27621	Item 720.94 32.5%	Item 680.45 9%	American Laubscher Corp. et al. v. U.S. (C.D. 4006)	New York Pinions and gears, and assemblies thereof
P78/83	Boe, J. July 7, 1978	Export Import Services, Inc., for the Account of Clairol, Inc.	77-8-01537	Items 544.51/ 807.00 17.5% on full value of mirrors, less cost or value of prefabricated U.S. manufactured components	Items 688.40/ 807.00 5.5% on full value of mirrors, less cost or value of prefabricated U.S. manufactured components	The Englishtown Corporation v. U.S. (C.A.D. 1187)	New York American goods returned; electrical makeup appliances incorporating mirrors, lights and other features
P78/84	Boe, J. July 7, 1978	Reynolds Trading Company	75-8-02188	Item 732.36 15%	Item 912.10 Free of duty	Agreed statement of facts	Los Angeles Derailleur Double Control Levers (click stick levers)
P78/85	Boe, J. July 7, 1978	Sanyo Electric, Inc.	75-6-01542	Item 684.70 7.5%	Item 685.25 6%	Agreed statement of facts	Los Angeles Headphones with permanently affixed adaptor; more than a headphone

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P78/86	Watson, J. August 1, 1978	Brentwood Originals	76-11-02407	Item 366.63 38% (on liquidation) Item 363.60 15% (on reliquidation)	Item 363.30 9.5%	Brentwood Originals v. U.S. (C.D. 4655)	Los Angeles Cotton bolster cases
P78/87	Newman, J. August 1, 1978	M.O.S., Inc	74-5-01354	Item 709.05 25%	Item 727.02 5.5%	Agreed statement of facts	Los Angeles Hydraulic chair and parts; furniture designed for hospital or medical use
P78/88	Newman, J. August 1, 1978	Trans World Gems	77-3-00362	Item 530.30 2.5%	Item 520.11 Free of duty	Agreed statement of facts	Los Angeles Semiprecious stones, natural
P78/89	Newman, J. August 2, 1978	Stern & Stern Textiles, Inc.	75-6-01467	Item 351.80 42% or 40%	Item 345.50 20% + 25¢ per lb.	Agreed statement of facts	New York Knit fabrics of manmade fibers
P78/90	Newman, J. August 2, 1978	Velsicol Chemical Corp.	76-12-02623	Item 405.15 1.7¢ per lb. + 12.5%	Free of duty pursuant to Generalized System of Preferences, title V, Trade Act of 1974, and Ex. Order 11888 of 11-24-75	Agreed statement of facts	Houston 2, 4 dichlorophenoxyacetic acid

P78/91	Richardson, J. August 3, 1978	Elliott & Hutchins, Inc	74-8-02275	Item 692.35 5.5%	Item 692.30 Free of duty	F. W. Myers & Company, Inc. v. U.S. (C.D. 4256, aff'd C.A.D. 1097) Norman G. Jensen, Inc. v. U.S. (C.D. 4634, aff'd C.A.D. 1183)	Champlain-Rouses Point (Ogdensburg) Bombardier Muskeg Tractors and Jimmy Skidders
P78/92	Ford, J. August 15, 1978	WMF of America, Inc., et al.	76-2-00326, etc.	Item 653.37 9.5%	Item 653.35 5%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	New York Brass candlesticks, etc.
P78/93	Richardson, J. August 15, 1978	Bar & Barbeque Products, Inc.	75-5-01126, etc.	Item 653.39 19%	Item 688.40 5.5%	Agreed statement of facts	Los Angeles Electrical novelty bar items and parts
P78/94	Re, C.J. August 16, 1978	Pagoda Trading Company	78-2-00232	Item 700.60 20%	Item 700.45 10%	Agreed statement of facts	Los Angeles Ladies footwear
P78/95	Ford, J. August 16, 1978	Almcee Wholesale Dist. Co.	70/46239	Item 653.37 17%	Item 653.35 9%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	San Francisco Brass candlesticks, lanterns, sconces, etc.
P78/96	Ford, J. August 16, 1978	The Little Jones Co.	76-2-00410	Item 653.37 9.5%	Item 653.35 5%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	Los Angeles Brass candlesticks, etc.
P78/97	Newman, J. August 17, 1978	Wacker Chemical Corp.	76-1-00269	Item 658.00 9%	Item 632.43 5%	Wacker Chemical Corporation v. U.S. (C.D. 4695)	New York Hyperpure silicon rods

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				Par. or Item No. and Rate	Par. or Item No. and Rate		
P78/98	Re., C. J. August 21, 1978	United China & Glass Co.	75-6-01507	Item 737.90 17.5%	Item 657.30 0.6¢ per lb. +11%	Agreed statement of facts	New Orleans Brass/copper miniatures of household articles, not chiefly used for amusement of children or adults
P78/99	Maletz, J. August 21, 1978	Larami Corp.	76-8-01777	Item 737.90 21%	Item 734.20 6%	Mego Corp. v. U.S. (C.A.D. 1137)	Philadelphia Bagatelle sets
P78/100	Re, C. J. August 28, 1978	Olympic International, Ltd.	75-4-00964	Item 685.30 6.5%	Item 678.50 5%	Judgment on the pleadings Montgomery Ward & Co. v. U.S. (C.D. 4573)	New York Compact radio phono 8-track tape player with two speakers
P78/101	Landis, J. August 28, 1978	International Seaway Trading Corp. et al.	66/59456, etc.	Par. 216 15%	Par. 1536 8.5%	Sumitomo Shoji New York, Inc. v. U.S. (C.D. 4505, aff'd C.A.D. 1169)	New York Synthetic rubber boots, overshoes, etc.
P78/102	Rao, J. August 29, 1978	Sterling Novelty Products d/o Glovemakers	75-5-01377	Item 706.60 20%	Item 774.60 8.5%	Adolco Trading Co. et al. v. U.S. (C.D. 4487)	New York Plastic shopping bags
P78/103	Watson, J. August 29, 1978	Dresser Industries, Inc., Dresser Atlas Division	76-6-01445	Item 711.86 25%	Item 722.16 7.5%	Agreed statement of facts	Houston "Imacon" high-speed camera

P78/104	Boe, J. September 19, 1978	Clairol, Inc., et al.	75-10-02714, etc.	Items 544.51/807.00 17.5% on full value of merchandise, less cost or value of prefabricated U.S. manufactured components	Items 688.40/807.00 5.5% on full value of imported merchandise, less cost or value of prefabricated U.S. manufactured components found applicable upon liquidation of merchandise	The Englishtown Corporation v. U.S. (C.A.D. 1187)	New York American goods returned; electrical makeup appliances incorporating mirrors, lights and other features
P78/105	Boe, J. September 20, 1978	Clairol, Inc.	77-6-01086	Items 544.51/807.00 17.5% on full value of merchandise, less cost or value of prefabricated U.S. manufactured components	Items 688.40/807.00 5.5% on full value of imported merchandise, less cost or value of prefabricated U.S. manufactured components found applicable upon liquidation of merchandise	The Englishtown Corporation v. U.S. (C.A.D. 1187)	Dallas (Houston) American goods returned; electrical makeup appliances incorporating mirrors, lights and other features
P78/106	Boe, J. September 20, 1978	Albert E. Price, Inc.	75-1-00147	Item 544.51 17.5%	Item 688.40 5.5%	The Englishtown Corporation v. U.S. (C.A.D. 1187)	Philadelphia Mirrors with electric lights

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				Par. or Item No. and Rate	Par. or Item No. and Rate		
P78/107	Richardson, J. September 21, 1978	NCR Corporation (formerly The National Cash Register Co.)	75-4-00945	Items 687.60/ 807.00 7% or 6% upon full value of imported merchandise (integrated circuits) less cost or value of prefabricated U.S. manufactured components except for cost or value of prefabricated U.S. manufactured die	Cost or value of prefabricated U.S. manufactured die ($0.89; $0.18) also deductible from full value of imported merchandise under item 807.00 and duty free	U.S. v. Texas Instruments Incorporated (C.A.D. 1178)	Dayton (Cleveland) American goods returned; integrated circuits containing U.S. fabricated components
P78/108	Rao, J. September 26, 1978	Hollywood Accessories, Div. of Orion Industries, Inc.	75-11-02933	Item 706.60 20%	Item 774.60 8.5%	Adolco Trading Co. et al. v. U.S. (C.D. 4487)	Los Angeles Vinyl bags
P78/109	Ford, J. September 26, 1978	J. Gerber & Co., Inc.	76-3-00786	Item 653.37 9.5%	Item 653.35 5%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	New York Candlesticks
P78/110	Ford, J. September 26, 1978	Hawker Siddeley Canada, Ltd., et al.	75-7-01819, etc.	Item 692.35 5.5% Item 692.16 5%	Item 692.30 Free of duty	U.S. v. Norman G. Jensen, Inc. (C.A.D. 1183)	Champlain - Rouses Pt. (Ogdensburg) Skidder tractors

P78/111	Ford, J. September 26, 1978	Metasco, Inc.	72-5-01204, etc.	Item 653.37 17%	Item 653.35 9%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	Seattle Brass candlesticks, lanterns, etc.
P78/112	Ford, J. September 27, 1978	Kanematsu New York, Inc., et al.	65/18296, etc.	Par. 353 15% (earphones marked "A") Par. 1531 20% (leather cases marked "B")	Par. 353 12.5% (items marked "A") Leather cases entireties with radios; classification, appraisement and liquidation of radios and cases void; protests premature and dismissed; entries ordered returned to customs officer for administrative action (items marked "B")	Midland International Corporation v. U.S. (C.D. 3217); North American Foreign Trading Corp. v. U.S. (C.D. 3968) (items marked "A") Lafayette Radio Electronics Corp. v. U.S. (C.A.D. 977) (items marked "B")	New York Earphones (items marked "A") Leather cases for radios; entireties (items marked "B")
P78/113	Boe, J. September 27, 1978	Hilts Willard Glove Corp. Hilts Willard Corp.	73-7-01802, etc.	Item 705.35 15% Item 734.97 11%	Item 735.05 9% or 7.5%	Agreed statement of facts	New York Ski gloves, ski mittens, etc. specially designed for the sport of snowmobiling
P78/114	Ford, J. September 28, 1978	Metasco, Inc.	70/30302, etc.	Item 653.37 15%	Item 653.35 8%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	New York Brass candlesticks, lanterns, etc.
P78/115	Ford, J. September 28, 1978	F. W. Myers & Co., Inc.	68/398	Item 692.35 11.5%	Item 692.30 Free of duty	U.S. v. Norman G. Jensen, Inc. (C.A.D. 1183)	Port Huron (Detroit) Skidder tractors

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				Par. or Item No. and Rate	Par. or Item No. and Rate		
P78/116	Re, C.J. September 29, 1978	Sugihara Trading of California, Inc.	77-3-00503	Item 705.35 15%	Item 735.05 7.5%	David E. Porter v. U.S. (C.D. 4641)	Los Angeles Motorcycle sports gloves
P78/117	Maletz, J. September 29, 1978	Mego Corp.	73-3-00793, etc.	Item 737.90 21% or 17.5%	Item 734.54 15% (model No. 90) Item 735.05 9% or 7.5% (model No. 95)	Mego Corp. v. U.S. (C.D. 4614)	New York Baseball gloves (model No. 90); boxing gloves (model No. 95)
P78/118	Boe, J. September 29, 1978	The Englishtown Corp.	69/22705	Item 544.51 33%	Item 706.60 20%	The Englishtown Corporation v. U.S. (C.A.D. 1187)	Los Angeles Electric travel beauty kits
P78/119	Boe, J. September 29, 1978	Export Import Services, Inc., For the Account of Clairol, Inc., et al.	77-5-00786, etc.	Items 544.51/ 807.00 17.5% upon full value of merchandise, less cost or value of prefabricated U.S. manufactured components	Items 688.40/ 807.00 5.5% upon full value of imported merchandise, less cost or value of prefabricated U.S. manufactured components found applicable upon liquidation of merchandise	The Englishtown Corporation v. U.S. (C.A.D. 1187)	New York American goods returned; electrical makeup appliances incorporating mirrors, lights and other features

P78/120	Ford, J. October 19, 1978	Fraser's, Inc., et al.	69/44909, etc.	Item 653.37 17%, 15%, 13%, 11% or 9.5%	Item 653.35 9%, 8%, 7%, 6% or 5%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	New York Brass candlesticks, etc.
P78/121	Ford, J. October 19, 1978	GTE Automatic Electric Incorporated	73-8-02235, etc.	Item 684.62 12%, 10% or 8.5% without allowance for cost or value of U.S. components	Items 684.62/807.00 12%, 10% or 8.5% with cost or value, as shown on table A attached to decision and judgment, of U.S. fabricated components of telephone equipment deductible from full value of imported telephone equipment	Agreed statement of facts	Ogdensburg American goods returned; telephone equipment; U.S. components
P78/122	Ford, J. October 19, 1978	WMF of America, Inc.	70/13954, etc.	Item 653.37 15%, 13% or 11%	Item 653.35 8%, 7% or 6%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	New York Brass candlesticks, etc.
P78/123	Ford, J. October 23, 1978	Aimcee Wholesale Corp. et al.	69/26772, etc.	Item 653.37 17%, 15% or 13%	Item 653.35 9%, 8% or 7%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	New York Brass candlesticks, etc.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P78/124	Ford, J. October 23, 1978	C. J. Tower & Sons of Buffalo, Inc.	76-5-01082	Item 945.69 25%	Item 692.27 4% (trailers) Truck-tractors are instruments of international traffic and not dutiable	Agreed statement of facts	Port Huron (Detroit) Automobile trailers imported from Canada, pulled by automobile truck-tractors of American origin
P78/125	Ford, J. October 24, 1978	C. J. Tower & Sons of Buffalo, Inc.	77-3-00319	Item 945.69 25%	Item 692.27 4% (trailers) Truck-tractors are instruments of international traffic and not dutiable	Agreed statement of facts	Port Huron (Detroit) Automobile trailers imported from Canada, pulled by automobile truck-tractors of American origin
P78/126	Newman, J. October 24, 1978	The Ashflash Corporation	72-5-01100	Item 683.80 13.75%	Item 688.40 9% and 6.5%	Judgment on the pleadings The Ashflash Corporation v. U.S. (C.D. 4643)	Seattle Combination lanterns and signaling lights
P78/127	Newman, J. October 26, 1978	Overseas Markets, Inc., et al.	69/31511, etc.	Item 653.37 17%, 15% or 9.5%	Item 653.35 9%, 8% or 5%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	New York Brass candlesticks, etc.
P78/128	Ford, J. October 31, 1978	Arriflex Corp. d/o Berkey Photo, Inc.	76-7-01698	Item 708.89 36% Protest approved for reclassification under item 722.32 at 12%	Error made in reliquidation of entry K187-544; other merchandise reclassified by mistake; merchandise invoiced as peri-	Consent judgment	New York Periscope finders; re-reliquidation to correct clerical error

					scope finders properly dutiable under item 722.32 at 12%, less $72.30 already refunded to plaintiff, a difference of $346.02		
P78/129	Ford, J. October 31, 1978	Norman G. Jensen, Inc.	76-10-02254, etc.	Item 692.35 5.5%	Item 692.30 Free of duty	U.S. v. Norman G. Jensen, Inc. (C.A.D. 1183)	Noyes (Pembina) Skidder tractors
P78/130	Landis, J. October 31, 1978	Samuel Shapiro & Co., Inc.	73-8-00719, etc.	Item 332.10 15% or 18% Item 332.40 15% Item 326.16 10.65%	Item 355.65 8.5% or 9%	Bruce Duncan Co., Inc. v. U.S. (C.D. 4736)	Baltimore Cotton woven fabrics
P78/131	Landis, J. October 31, 1978	Samuel Shapiro & Co., Inc.	73-8-02395	Item 332.10 15%, 18% or 21%	Item 355.65 8.5% or 9%	Bruce Duncan Co., Inc. v. U.S. (C.D. 4736)	Baltimore Cotton woven fabrics
P78/132	Landis, J. October 31, 1978	Samuel Shapiro & Co., Inc.	73-8-02398	Item 326.12 9.89%, 10.49% or 11.09%	Item 355.65 8.5% or 9%	Bruce Duncan Co., Inc. v. U.S. (C.D. 4736)	Baltimore Cotton woven fabrics
P78/133	Landis, J. October 31, 1978	Samuel Shapiro & Co., Inc.	73-10-02954	Item 326.12 9.89% or 10.49%	Item 355.65 8.5% or 9%	Bruce Duncan Co., Inc. v. U.S. (C.D. 4736)	Baltimore Cotton woven fabrics
P78/134	Landis, J. October 31, 1978	Samuel Shapiro & Co., Inc.	74-2-00532	Item 332.10 15% or 18% Item 326.12 10.49%	Item 355.65 8.5% or 9%	Bruce Duncan Co., Inc. v. U.S. (C.D. 4736)	Baltimore Cotton woven fabrics

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P78/135	Ford, J. November 14, 1978	International Harvester Company	77-8-01483	Item 692.35 5.5%	Item 692.30 Free of duty	U.S. v. Norman G. Jensen, Inc. (C.A.D. 1183)	Port Huron (Detroit) Tractors suitable for agricultural use and parts thereof
P78/136	Richardson, J. November 14, 1978	Phostoxin Sales, Inc.	76-4-01050, etc.	Items 432.00/425.52 1.5¢ per lb. +7.5%	Items 432.00/417.24 5%	Phostoxin Sales, Inc. v. U.S. (C.D. 4729)	Los Angeles Pesticides
P78/137	Ford, J. November 15, 1978	Elliot International, Inc.	75-11-03008	Item 705.85 35%	Item 705.85 15%	Agreed statement of facts	Los Angeles Gloves
P78/138	Ford, J. November 15, 1978	F. W. Myers & Co., Inc.	75-3-00642	Item 692.35 5.5% Item 692.16 5%	Item 692.30 Free of duty	U.S. v. Norman G. Jensen, Inc. (C.A.D. 1183)	Champlain-Rouses Point, Alexandria Bay (Ogdensburg); Port Huron (Detroit) Skidder tractors
P78/139	Richardson, J. November 15, 1978	Raytheon Company	76-7-01023	Item 687.60 6%	Items 687.60/807.00 6% upon value of integrated circuit less declared values of prefabricated U.S. manufactured die, wire, header and can, as set forth in schedule attached to decision and judgment	U.S. v. Texas Instruments Incorporated (C.A.D. 1178)	San Francisco American goods returned; metal can transistors properly classifiable as integrated circuits; U.S. fabricated components (items marked "A" and "B")
P78/140	Watson, J.	Kiffe Sales Company	76-12-02643	Item 772.60			

P78/140	Watson, J. November 15, 1978	Kiffe Sales Company	76-12-02843	Item 389.60 25¢ per lb. + 15%	Item 735.20 10%	The Newman Importing Co., Inc. v. U.S. (C.D. 4648)	New York Backpacking tents
P78/141	Maletz, J. November 15, 1978	Amico, Inc.	75-10-02640	Item 737.90 17.5%	Item 734.20 5.5%	Mego Corporation v. U.S. (C.A.D. 1137)	Philadelphia B/O Pachinko pinball games; game machines having mechanical controls for manipulating action
P78/142	Ford, J. November 16, 1978	Bombardier, Ltd.	73-7-02059	Item 692.35 5.5%	Item 692.30 Free of duty	F. W. Myers & Company, Inc. v. U.S. (C.D. 4256, aff'd C.A.D. 1097) Norman G. Jensen, Inc. v. U.S. (C.D. 4634, aff'd C.A.D. 1183)	Champlain-Rouses Point (Ogdensburg); Port Huron (Detroit) Bombardier Muskeg Tractors and Jimmy Skidders
P78/143	Ford, J. November 16, 1978	Norman G. Jensen, Inc.	75-5-01208, etc.	Item 692.35 5.5%	Item 692.30 Free of duty	U.S. v. Norman G. Jensen, Inc. (C.A.D. 1183)	Grand Portage, International Falls-Ranier (Duluth); Noyes (Pembina) Skidder tractors
P78/144	Landis, J. November 16, 1978	Kufner Textile Corp.	74-10-02913, etc.	Item 332.10 15% Items 326.16, 326.17 and 326.22 10.65%, 10.84% or 11.79% Items 328.12 or 328.22 13.29% or 15.19% Item 320.20 9.5% Items 327.16 or 327.17 12.17% or 12.55%	Item 355.65 8.5% or 9%	Bruce Duncan Co., Inc. v. U.S. (C.D. 4736)	Charleston Cotton woven fabrics

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P78/145	Boe, J. November 16, 1978	New York Merchandise Co., Inc.	70/42306, etc.	Item 544.51 23.5%	Item 688.40 8%	The Englishtown Corporation v. U.S. (C.A.D. 1187)	San Diego Make-up mirror with lights
P78/146	Maletz, J. December 4, 1978	Mego Corp.	66/72748, etc.	Item 737.90 35%, 31%, 28% or 24%	Items 734.55 and 734.54 15% (model No. 99) Item 735.05 15%, 13%, 12% or 10% (model No. 95)	Mego Corp. v. U.S. (C.D. 4614)	New York Baseball gloves (model No. 99); boxing gloves (model No. 95)
P78/147	Re, C. J. December 5, 1978	Hanover Glove Co.	76-11-02540	Item 705.35 15%	Item 734.97 9%	Stonewall Trading Co. v. U.S. (C.D. 4023)	Baltimore Ski gloves, mitts or mittens
P78/148	Rao, J. December 5, 1978	Fundimensions Division	76-2-00506	Item 737.90 17.5%	Item 688.40 5.5%	Agreed statement of facts	Detroit HO or smaller scale model locomotive chassis with self-contained electric motors; not chiefly used for amusement
P78/149	Rao, J. December 6, 1978	S. S. Kresge Co.	77-12-04953	Item 206.97 8%	Item A727.35 Duty free pursuant to general headnote 3(c) of TSUS	Agreed statement of facts	Longview (Portland, Oreg.) Wooden wine racks
P78/150	Ford, J. December 6, 1978	F. W. Myers & Co., Inc.	66/45600, etc.	Item 692.35 11.5%	Item 692.30 Free of duty	U.S. v. Norman G. Jensen, Inc. (C.A.D. 1183)	Champlain-Rouses Point (Ogdensburg) Skidder tractors

P78/151	Newman, J. December 6, 1978	Durst Industries, Inc., et al.	73-7-01696, etc.	Item 657.20 11% or 9.5%	Item 653.95 10% or 8.5%	Hancock Gross, Inc. v. U.S. (C.D. 4662) The Westbrass Company v. U.S. (C.D. 4293)	New York Strainer bodies or small strainer plugs in c.v. of steel
P78/152	Newman, J. December 7, 1978	Durst Industries, Inc.	68/6168, etc.	Item 657.20 15% (items marked "A") Item 657.35 15% + 1.275¢ per lb.	Item 653.95 13.5% (items marked "A") Item 654.00 10% (items marked "B")	Hancock Gross, Inc. v. U.S. (C.D. 4662); The Westbrass Company v. U.S. (C.D. 4293) (items marked "A" and "B")	New York Strainer bodies or shower stall strainers in c.v. of steel (items marked "A"); waste and overflow strainer drains in c.v. of brass (items marked "B")
P78/153	Ford, J. December 11, 1978	Clark Equipment Company	77-2-00293	Items 807.00/692.35 5.5%	Item 692.30 Free of duty	Norman G. Jensen, Inc. v. U.S. (C.D. 4634, aff'd C.A.D. 1183)	Buffalo Log skidders imported from Canada incorporating certain parts of U.S. manufacture assembled in Canada
P78/154	Ford, J. December 12, 1978	Norman G. Jensen, Inc.	74-3-00849	Item 692.35 5.5% Item 692.16 5%	Item 692.30 Free of duty	U.S. v. Norman G. Jensen, Inc. (C.A.D. 1183)	Grand Portage (Duluth) Skidder tractors
P78/155	Maletz, J. December 12, 1978	F. J. Strauss Co., Inc.	73-3-00784, etc.	Item 737.90 17.5%	Item 734.54 15%	Mego Corp. v. U.S. (C.D. 4614)	New York Item No. 5/400 baseball gloves
	Maletz, J. December 14, 1978	Shayne Knitwear, Inc.	75-3-00692	Item 382.58 37.5¢ per lb. + 20% (blouses and pants) Item 791.75 6% (jackets)	Item 791.75 6% Dutiable as entireties on basis of export value; said value is invoice unit price	J. C. Penney Purchasing Corporation v. U.S. (C.D. 4671)	New York, Ladies' 3-piece suits; entireties

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
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P78/157	Richardson, J. December 18, 1978	C. J. Tower & Sons, Inc.	74-12-03478	Item 687.50 15%	Item 800.00 Free of duty	Agreed statement of facts	Detroit American goods returned; color picture tubes
P78/158	Landis, J. December 18, 1978	Samuel Shapiro & Co., Inc., et al.	73-10-02958, etc.	Item 332.10 15%, 18% or 21% (items marked "A") Items 326.12 or 326.15 9.89%, 10.46%, 10.49% or 11.09% (items marked "A") Item 320.20 9.51% (items marked "A") Item 338.30 22.5% + 13¢ per lb. (items marked "B")	Item 355.65 8.5% or 9% (items marked "A") Item 355.82 15% + 12.5¢ per lb.; 18% + 15¢ per lb.; or 21% + 17¢ per lb. (items marked "B")	Bruce Duncan Co., Inc. v. U.S. (C.D. 4736)	Baltimore Woven fabrics
P78/159	Ford, J. December 20, 1978	Norman G. Jensen, Inc.	73-12-03354	Item 692.35 6.5% or 5.5% Item 692.16 5% Item 948.00 10%	Item 693.30 Free of duty	U.S. v. Norman G. Jensen, Inc. (C.A.D. 1183)	Grand Portage (Duluth) Skidder tractors
P78/160	Maletz, J. December 27, 1978	Bar & Barbeque Products, Inc.	77-11-04669 etc.	Item 653.39 19%	Item 688.40 5.5%	Agreed statement of facts	Los Angeles Electrical novelty items (electric signal bar lamps and parts)

P78/161	Malets, J. December 27, 1978	Border Brokerage Co., Inc.	75-5-01171	Item 727.55 10%	Item 518.44 0.1¢ per lb.	Agreed statement of facts	Blaine (Seattle) Articles in part of asbestos and hydraulic cement (patio tubs, pots, planters, etc.)
P78/162	Malets, J. December 27, 1978	S.S. Kresge Co.	77-8-01709	Item 206.98 8%	Item A206.98 Free of duty pursuant to general headnote 3(c)	Agreed statement of facts	Savannah Wood coaster sets

ABSTRACTS OF CUSTOMS COURT DECISIONS

Reappraisements

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R78/143	Newman, J. July 11, 1978	Christian Dior Perfumes Corporation	R69/3000, etc.	Cost of production (items marked "A") Constructed value (items marked "B")	Respective unit values indicated in schedule "A" attached to decision and judgment (items marked "A") Respective unit values indicated in schedule "B" attached to decision and judgment (items marked "B")	Agreed statement of facts	New York Perfumery, including cologne and toilet waters, containing alcohol (items marked "A") Cosmetics and other toilet preparations, some containing alcohol; etc. (items marked "B")
R78/144	Newman, J. July 31, 1978	Imports, Inc., et al.	R61/3593, etc.	American selling price	As set forth under column titled "Claimed Value Per Pair" on schedule A attached to decision and judgment	Agreed statement of facts	New York Footwear

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R78/145	Newman, J. July 31, 1978	Lasco Rubber Co.	R62/4629	American selling price	As set forth under column titled "Claimed Value Per Pair" on schedule A attached to decision and judgment	Agreed statement of facts	Boston Footwear
R78/146	Newman, J. August 1, 1978	The Citadel Resources, Inc.	77-3-00527	Export value	Invoice values, net packed	Agreed statement of facts	New York Baskets in coconut or baskets in latanier
R78/147	Newman, J. August 1, 1978	Lasco Rubber Co.	R62/9442	American selling price	As set forth under column titled "Claimed Value Per Pair" on schedule A attached to decision and judgment	Agreed statement of facts	Baltimore Footwear
R78/148	Newman, J. August 1, 1978	Lasco Rubber Co.	R63/3062	American selling price	As set forth under column titled "Claimed Value Per Pair" on schedule A attached to decision and judgment	Agreed statement of facts	San Francisco Footwear
R78/149	Newman, J. August 1, 1978	Lasco Rubber Co.	R63/4063	American selling price	$2.37, $2.42 and $2.46, less 6%, per pair	Agreed statement of facts	Los Angeles Footwear
R78/150	Richardson, J. August 2, 1978	Jaymar Ruby, Inc.	74-3-00563	Constructed value	Appraised values less $0.36 per yard	H. M. Young Associates, Inc. v. U.S. (C.D. 4388, aff'd C. A. D. 1138)	New York "Cotton Elastic Web"

R78/151	Richardson, J. August 2, 1978	Jaymar Ruby, Inc.	74-5-01335	Constructed value	Appraised values less $0.36 per yard	H. M. Young Associates, Inc. v. U.S. (C.D. 4388, aff'd C.A.D. 1138)	New York "Cotton Elastic Webbing", and "Tissu coton avec elastique pour vetements"
R78/152	Richardson, J. August 2, 1978	H. W. Robinson & Co., Inc.	R66/23908, etc.	Constructed value	Appraised values less $0.36 per yard	H. M. Young Associates, Inc. v. U.S. (C.D. 4388, aff'd C.A.D. 1138)	New York "Elastic Webbings", "Tissu coton avec elastique pour vetements", etc.
R78/153	Watson, J. August 2, 1978	Given International, Inc.	71-10-01275, etc.	Cost of production	Invoiced unit prices, f.o.b. Japan	Given International, Inc. v. U.S. (C.D. 4624)	Los Angeles Lathes
R78/154	Watson, J. August 2, 1978	Given International, Inc.	72-5-01046, etc.	Cost of production	Invoiced unit prices, f.o.b. Japan	Given International, Inc. v. U.S. (C.D. 4624)	Houston Lathes
R78/155	Watson, J. August 2, 1978	Kanematsu New York, Inc.	R68/7045, etc.	Cost of production	Invoiced unit prices, f.o.b. Japan	Given International, Inc. v. U.S. (C.D. 4624)	Cleveland Lathes and accessories
R78/156	Newman, J. August 2, 1978	Fancy Industries, Inc.	77-7-01189	Export value	F.o.b. invoice unit prices plus 3% commission	Agreed statement of facts	New York Vinyl plastic handbags
R78/157	Richardson, J. August 3, 1978	Jaymar Ruby, Inc.	R66/24311, etc.	Constructed value	Appraised values less $0.36 per yard	H. M. Young Associates, Inc. v. U.S. (C.D. 4388, aff'd C.A.D. 1138)	Chicago "Tissu coton avec elastique pour vetements", "Cotton Elastic Web", etc.
R78/158	Richardson, J. August 3, 1978	Jaymar Ruby, Inc.	R69/8710, etc.	Constructed value	Appraised values less $0.36 per yard	H. M. Young Associates, Inc. v. U.S. (C.D. 4388, aff'd C.A.D. 1138)	Chicago "Tissu coton avec elastique pour vetements", "Cotton Elastic Web", etc.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R78/159	Richardson, J. August 3, 1978	Jaymar Ruby, Inc.	R70/9006, etc.	Constructed value	Appraised values less $0.36 per yard	H. M. Young Associates, Inc. v. U.S. (C.D. 4388, aff'd C.A.D. 1138)	Chicago "Tissu coton avec elastique pour vetements", and "Cotton Elastic Web"
R78/160	Richardson, J. August 3, 1978	H. W. Robinson & Co., a/c Jaymar Ruby, Inc., et al.	R66/14284, etc.	Constructed value	Appraised values less $0.36 per yard	H. M. Young Associates, Inc. v. U.S. (C.D. 4388, aff'd C.A.D. 1138)	New York "Tissu coton avec elastique pour vetements", "Cotton Elastic Webbing", etc.
R78/161	Richardson, J. August 3, 1978	H. W. Robinson & Co., Inc., a/c Jaymar Ruby, Inc.	R70/3892, etc.	Constructed value	Appraised values less $0.36 per yard	H. M. Young Associates, Inc. v. U.S. (C.D. 4388, aff'd C.A.D. 1138)	New York "Cotton Elastic Web" and "Tissu coton avec elastique pour vetements"
R78/162	Watson, J. August 3, 1978	Compass Instrument & Optical Co., Inc.	R60/1314, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Binoculars
R78/163	Watson, J. August 3, 1978	Compass Instrument & Optical Co., Inc.	R60/12852, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Binoculars

R78/164	Watson, J. August 3, 1978	Compass Instrument & Optical Co., Inc.	R60/17434, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Binoculars
R78/165	Watson, J. August 3, 1978	Compass Instrument & Optical Co., Inc.	R60/22508, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Binoculars
R78/166	Watson, J. August 3, 1978	Given International, Inc.	R70/8468, etc.	Cost of production	Invoiced unit prices, f.o.b. Japan	Given International, Inc. v. U.S. (C.D. 4624)	Los Angeles Lathes
R78/167	Richardson, J. August 4, 1978	Jaymar Ruby, Inc.	R67/6312, etc.	Constructed value	Appraised values less $0.36 per yard	H. M. Young Associates, Inc. v. U.S. (C.D. 4388, aff'd C.A.D. 1138)	Chicago "Tissu coton avec elastique pour vetements" and "Cotton Elastic Web"
R78/168	Watson, J. August 4, 1978	Kanematsu-Gosho (USA), Inc., et al.	R68/3789, etc.	Cost of production	Invoiced unit prices, f.o.b. Japan	Given International, Inc. v. U.S. (C.D. 4624)	New York Lathes and accessories
R78/169	Watson, J. August 16, 1978	Given International, Inc.	R70/3271	Cost of production	Invoiced unit prices, f.o.b. Japan	Given International, Inc. v. U.S. (C.D. 4624)	Houston Lathes and accessories
R78/170	Richardson, J. August 17, 1978	H. W. Robinson Air Freight Corp., a/c Jaymar Ruby, Inc., et al.	R64/21006, etc.	Constructed value	Appraised values less $0.36 per yard	H. M. Young Associates, Inc. v. U.S. (C.D. 4388, aff'd C.A.D. 1138)	New York "Cintura Elastica 'New Belt' ", etc.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R78/171	Richardson, J. August 17, 1978	H. A. Seinsheimer Co.	R65/1050, etc.	Constructed value	Appraised values less $0.36 per yard	H. M. Young Associates, Inc. v. U.S. (C.D. 4388, aff'd C.A.D. 1138)	Cincinnati (Cleveland) "Elastic Fabric"
R78/172	Richardson, J. August 21, 1978	Jaymar Ruby, Inc.	72-1-00001, etc.	Constructed value	Appraised values less $0.36 per yard	H. M. Young Associates, Inc. v. U.S. (C.D. 4388, aff'd C.A.D. 1138)	Chicago "Tissu coton avec elastique pour vetements", etc.
R78/173	Newman, J. August 21, 1978	Yoshida International Inc.	R71/14, etc.	Constructed value	Equal to invoiced unit prices plus 8.5%, net packed	Agreed statement of facts	Miami Zippers and zipper parts, advisorily classified under either item 745.70, 745.72 or 745.74
R78/174	Watson, J. August 28, 1978	Kanematsu-Gosho (USA), Inc., et al.	R68/14602, etc.	Cost of production	Invoiced unit prices, f.o.b. Japan	Given International, Inc. v. U.S. (C.D. 4624)	Boston Lathes and accessories
R78/175	Re, C. J. August 29, 1978	Matsushita Electric Corp. of America	77-6-02853	Export value	$25.00 per unit, net, packed	Agreed statement of facts	New York Panasonic Brand Cassette Car Stereo Tape Player CX-233E U
R78/176	Rao, J. August 29, 1978	Lone Star Finance Corporation	R62/6450	Cost of production	DM3339.00	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Houston Volkswagen automobiles

R78/177	Rao, J. August 29, 1978	Egon S. Oppenheim	R66/3363	Cost of production	DM3372.00	U.S. v. F & D Trading Corp. (C.A.D. 1089)	New Orleans Volkswagen automobiles
R78/178	Rao, J. August 29, 1978	Usico Imports, Inc.	R65/11385	Cost of production	DM3363.00	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Jacksonville (Tampa) Volkswagen automobiles
R78/179	Re, C. J. August 30, 1978	Chadwick-Miller, Inc.	R70/0878, etc.	Export value	Invoice ex-factory value exclusive of invoiced amounts for buying commissions, and inland freight and shipping charges	Chadwick-Miller Importers, Inc., et al. v. U.S. (R.D. 11743)	Los Angeles Sundry items
R78/180	Rao, J. August 30, 1978	Usico Imports, Inc.	R67/16082, etc.	Cost of production	As specified in column designated "Claimed Value" on schedule attached to decision and judgment	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Charleston Volkswagen automobiles
R78/181	Watson, J. August 30, 1978	Kanematsu New York, Inc., et al.	R68/4450, etc.	Cost of production	Invoiced unit prices, f.o.b. Japan	Given International, Inc. v. U.S. (C.D. 4624)	Houston Lathes and accessories
R78/182	Watson, J. September 19, 1978	Kanematsu-Gosho (USA), Inc., et al.	R68/5517, etc.	Cost of production	Invoiced unit prices, f.o.b. Japan	Given International, Inc. v. U.S. (C.D. 4624)	Boston Lathes and accessories
R78/183	Watson, J. September 20, 1978	Kanematsu New York, Inc., et al.	R68/7635, etc.	Cost of production	Invoiced unit prices, f.o.b. Japan	Given International, Inc. v. U.S. (C.D. 4624)	Chicago Lathes and accessories
R78/184	Maletz, J. September 21, 1978	Talia Fashions, Inc.	76-12-02657	Export value	Appraised values less only 5% buying commissions included in appraised values	Agreed statement of facts	New York Wearing apparel

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R78/185	Maletz, J. September 26, 1978	American Express Co. et al.	R61/16874, etc.	American selling price	As set forth under column titled "Claimed Value Per Pair" on schedule attached to decision and judgment	Agreed statement of facts	San Francisco Footwear
R78/186	Maletz, J. September 26, 1978	International Seaway Trading Corp. et al.	R61/1121, etc.	American selling price	As set forth under column titled "Claimed Value Per Pair" on schedule attached to decision and judgment	Agreed statement of facts	New York Footwear
R78/187	Maletz, J. September 26, 1978	International Seaway Trading Corp.	R64/15293, etc.	American selling price	$8.14 less 6%; $3.95 less 6%	Agreed statement of facts	Boston Footwear
R78/188	Maletz, J. September 26, 1978	Lasco Rubber Co.	R61/22667, etc.	American selling price	As set forth under column titled "Claimed Value Per Pair" on schedule attached to decision and judgment	Agreed statement of facts	Portland, Oreg. Footwear
R78/189	Maletz, J. September 27, 1978	International Seaway Trading Corp. et al.	R60/12882, etc.	American selling price	As set forth under column titled "Claimed Value Per Pair" on schedule attached to decision and judgment	Agreed statement of facts	New York Footwear
R78/190	Maletz, J. September 27, 1978	International Seaway Trading Corp. et al.	R60/12891, etc.	American selling price	As set forth under column titled "Claimed Value Per Pair" on schedule attached to decision and judgment	Agreed statement of facts	New York Footwear

R78/191	Maletz, J. September 27, 1978	Lasco Rubber Co. et. al	R61/1423, etc.	American selling price	As set forth under column titled "Claimed Value Per Pair" on schedule attached to decision and judgment	Agreed statement of facts	New York Footwear
R78/192	Maletz, J. September 27, 1978	Lasco Rubber Co. et al.	R61/1426, etc.	American selling price	As set forth under column titled "Claimed Value Per Pair" on schedule attached to decision and judgment	Agreed statement of facts	New York Footwear
R78/193	Maletz, J. September 27, 1978	Lasco Rubber Co. et al.	R61/2968, etc.	American selling price	As set forth under column titled "Claimed Value Per Pair" on schedule attached to decision and judgment	Agreed statement of facts	New York Footwear
R78/194	Ford, J. October 19, 1978	Talia Fashions, Inc.	75-8-02066	Export value	Appraised values, less only the 5% buying commissions	Agreed statement of facts	New York Wearing apparel
R78/195	Ford, J. October 23, 1978	International Seaway Trading Corp. et al.	R60/20467, etc.	American selling price	As set forth under column titled "Claimed Value Per Pair" on schedule attached to decision and judgment	Agreed statement of facts	New York Footwear
R78/196	Ford, J. October 23, 1978	International Seaway Trading Corp. et al.	R61/4810, etc.	American selling price	As set forth under column titled "Claimed Value Per Pair" on schedule attached to decision and judgment	Agreed statement of facts	New York Footwear

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R78/197	Ford, J. October 23, 1978	Lasco Rubber Co.	R62/3093	American selling price	As set forth under column titled "Claimed Value Per Pair" on schedule attached to decision and judgment	Agreed statement of facts	Seattle Footwear
R78/198	Ford, J. October 24, 1978	International Seaway Trading Corp.	R61/12502	American selling price	$1.53 less 6% (per pair)	Agreed statement of facts	San Francisco Footwear
R78/199	Ford, J. October 24, 1978	International Seaway Trading Corp.	R61/22182	American selling price	$7.98 less 6% (per pair)	Agreed statement of facts	New York Footwear
R78/200	Ford, J. October 24, 1978	Lasco Rubber Co.	R61/1424, etc.	American selling price	As set forth under column titled "Claimed Value Per Pair" on schedule attached to decision and judgment	Agreed statement of facts	New York Footwear
R78/201	Ford, J. October 24, 1978	Lasco Rubber Co.	R61/19007	American selling price	As set forth under column titled "Claimed Value Per Pair" on schedule attached to decision and judgment	Agreed statement of facts	Seattle Footwear
R78/202	Ford, J. October 25, 1978	Imports, Inc.	R61/3594	American selling price	$1.52 less 6% (per pair)	Agreed statement of facts	New York Footwear

R78/203	Ford, J. October 25, 1978	International Seaway Trading Corp. et al.	R60/17814, etc.	American selling price	As set forth under column titled "Claimed Value Per Pair" on schedule attached to decision and judgment	Agreed statement of facts	New York Footwear
R78/204	Ford, J. October 25, 1978	Lasco Rubber Co.	R61/19770, etc.	American selling price	As set forth under column titled "Claimed Value Per Pair" on schedule attached to decision and judgment	Agreed statement of facts	New York Footwear
R78/205	Ford, J. October 25, 1978	Lasco Rubber Co. et al.	R61/22351, etc.	American selling price	As set forth under column titled "Claimed Value Per Pair" on schedule attached to decision and judgment	Agreed statement of facts	New York Footwear
R78/206	Ford, J. October 25, 1978	Imports, Inc.	R63/1097	American selling price	As set forth under column titled "Claimed Value Per Pair" on schedule attached to decision and judgment	Agreed statement of facts	Los Angeles Footwear
R78/207	Ford, J. October 25, 1978	Talia Fashions, Inc.	76-3-00560	Export value	Appraised values, less only the 5% buying commissions	Agreed statement of facts	New York Wearing apparel
R78/208	Ford, J. October 25, 1978	Talia Fashions, Inc.	77-4-00052, etc.	Export value	Appraised values, less only the 5% buying commissions	Agreed statement of facts	New York Wearing apparel

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R78/209	Re, C. J. October 26, 1978	C. J. Tower & Sons of Buffalo, Inc.	R69/501	Cost of production	As set forth in decision and judgment in column designated "Total Cost of Production of Basic Automobiles" at amounts in Canadian currency, including value of U.S. components as appraised; value of optional equipment on each automobile in Canadian currency is the value found by appraising official as reflected on the invoices	U.S. v. C. J. Tower & Sons of Buffalo, Inc. (C.A.D. 1079)	Buffalo Studebaker automobiles and optional equipment
R78/210	Ford, J. October 26, 1978	Lasco Rubber Co. et al.	R62/4750, etc.	American selling price	As set forth under column titled "Claimed Value Per Pair" on schedule attached to decision and judgment	Agreed statement of facts	New York Footwear
R78/211	Ford, J. October 26, 1978	Lasco Rubber Co.	R62/13809, etc.	American selling price	As set forth under column titled "Claimed Value Per Pair" on schedule attached to decision and judgment	Agreed statement of facts	San Francisco Footwear
R78/212	Ford, J. October 26, 1978	Parliament Imports, Ltd., Le Mans Imports, Ltd., Alba Fdwg.	76-3-00630, etc.	Export value	Appraised values, less only the 5% buying commissions	Agreed statement of facts	New York Wearing apparel

R78/213	Ford, J. October 30, 1978	Lasco Rubber Co.	R62/7975	American selling price	$1.86 less 6% (per pair)	Agreed statement of facts	Baltimore Footwear
R78/214	Ford, J. October 30, 1978	Lasco Rubber Co. et al.	R63/2547, etc.	American selling price	As set forth under column titled "Claimed Value Per Pair" on schedule attached to decision and judgment	Agreed statement of facts	Los Angeles Footwear
R78/215	Ford, J. October 30, 1978	Talia Fashions, Inc.	75-9-02487	Export value	Appraised values, less only the 5% buying commissions	Agreed statement of facts	New York Wearing apparel
R78/216	Ford, J. October 31, 1978	Durham Industries, Inc.	76-10-02367 etc.	Export value	Equal to f.o.b. invoiced unit values of merchandise plus percentages thereof set forth on schedule B attached to decision and judgment	Agreed statement of facts	Portland, Oreg. Toys
R78/217	Ford, J. October 31, 1978	Medalist Athletic Shoes, a division of Medalist Industries, Inc.	76-8-01915	Export value	Invoice value of merchandise	Agreed statement of facts	Seattle Jogger-style running shoes or footwear

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R78/218	Re, C. J. November 14, 1978	C. J. Tower & Sons of Buffalo, Inc.	R69/499	Cost of production	As set forth in decision and judgment in column designated "Total Cost of Production of Basic Automobiles" at amounts in Canadian currency, including value of U.S. components as appraised; value of optional equipment on each automobile in Canadian currency is the value found by appraising official as reflected on the invoices	U.S. v. C. J. Tower & Sons of Buffalo, Inc. (C.A.D. 1079)	Buffalo Studebaker automobiles and optional equipment
R78/219	Rao, J. November 14, 1978	Continental Merchandise Co., Inc.	R61/8150, etc.	Export value	Equal to appraised value less amounts listed on invoices as "design charges", or by words of similar description, which are marked "x", "xx", or "A"	Panation Trade Co. v. U.S. (A.R.D. 181)	New York Lighters
R78/220	Ford, J. November 14, 1978	Aircargo Brokerage Co. et al.	R61/9566, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Miami Binoculars with pigskin or leather cases
R78/221	Ford, J. November 16,	Fownes Bros. & Co., Inc.	77-4-00608	Constructed value	Appraised value as determined by customs,	Agreed statement of facts	New York Vinyl palm gloves with

R78/221	Ford, J. November 16, 1978	Fownes Bros. & Co., Inc.	77-4-00608	Constructed value	Appraised value as determined by customs, less 30% addition which customs added to make appraised values	Agreed statement of facts	New York Vinyl palm gloves with acrylic PK
R78/222	Re, C. J. November 27, 1978	C. J. Tower & Sons of Buffalo, Inc.	R69/500	Cost of production	As set forth in decision and judgment in column designated "Total Cost of Production of Basic Automobiles" at amounts in Canadian currency, including value of U.S. components as appraised; value of optional equipment on each automobile in Canadian currency is the value found by appraising official as reflected on the invoices	U.S. v. C. J. Tower & Sons of Buffalo, Inc. (C.A.D. 1079).	Buffalo Studebaker automobiles and optional equipment
R78/223	Newman, J. November 27, 1978	Ernest Lowenstein, Inc.	R64/14034, etc.	Export value	Appraised values less 15%	U.S. v. Ernest Lowenstein, Inc. (A.R.D. 325)	New York Glass stones, pendants, beads, etc.
R78/224	Newman, J. November 17, 1978	Ernest Lowenstein, Inc.	R64/16673, etc.	Export value	Appraised values less 15%	U.S. v. Ernest Lowenstein, Inc. (A.R.D. 325)	New York Glass stones, pendants, beads, etc.
R78/225	Newman, J. December 5, 1978	Ernest Lowenstein, Inc.	R64/20803, etc.	Export value	Appraised values less 15%	U.S. v. Ernest Lowenstein, Inc. (A.R.D. 325)	New York Glass stones, pendants, beads, etc.
R78/226	Newman, J. December 5, 1978	Ernest Lowenstein, Inc.	R65/907, etc.	Export value	Appraised values less 15%	U.S. v. Ernest Lowenstein, Inc. (A.R.D. 325)	New York Glass stones, pendants, beads, etc.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R78/227	Newman, J. December 6, 1978	Ernest Lowenstein, Inc.	R65/5150, etc.	Export value	Appraised values less 15%	U.S. v. Ernest Lowenstein, Inc. (A.R.D. 325)	New York Glass stones, pendants, beads, etc.
R78/228	Newman, J. December 7, 1978	Ernest Lowenstein, Inc.	R65/9615, etc.	Export value	Appraised values less 15%	U.S. v. Ernest Lowenstein, Inc. (A.R.D. 325)	New York Glass stones, pendants, beads, etc.
R78/229	Newman, J. December 11, 1978	Ernest Lowenstein, Inc.	R64/12716, etc.	Export value	Appraised values less 15%	U.S. v. Ernest Lowenstein, Inc. (A.R.D. 325)	New York Glass stones, pendants, beads, etc.
R78/230	Boe, J. December 11, 1978	Pacific Marine Schwabacher	76-12-02332	Antidumping duties	Merchandise not subject to antidumping duties; protest sustained; district director shall refund assessed antidumping duties	Judgment on the pleadings	Seattle Fish netting
R78/231	Re, C. J. December 12, 1978	C. J. Tower & Sons of Buffalo, Inc.	R69/484	Cost of production	As set forth in decision and judgment in column designated "Total Cost of Production of Basic Automobiles" at amounts in Canadian currency, including value of U.S. components as appraised; value of optional equipment was value found by appraising official as reflected on the invoices	Agreed statement of facts	Buffalo Studebaker automobiles and optional equipment

R78/232	Ford, J. December 12, 1978	Mitsui & Co., Ltd.	R67/1295, etc.	United States value	Invoiced unit prices, net packed, plus 50%	Agreed statement of facts	Chicago Electron receiving tubes
R78/233	Newman, J. December 13, 1978	Ernest Lowenstein, Inc.	R63/14218, etc.	Export value	Appraised values less 15%	U.S. v. Ernest Lowenstein, Inc. (A.R.D. 325)	New York Glass stones, pendants, beads, etc.
R78/234	Newman, J. December 13, 1978	Ernest Lowenstein, Inc.	R64/4166, etc.	Export value	Invoiced unit prices less 2.845%	U.S. v. Ernest Lowenstein, Inc. (A.R.D. 325)	New York Glass stones, pendants, beads, etc.
R78/235	Newman, J. December 13, 1978	Ernest Lowenstein, Inc.	R64/11438, etc.	Export valu	Appraised values less 15%	U.S. v. Ernest Lowenstein, Inc. (A.R.D. 325)	New York Glass stones, pendants, beads, etc.
R78/236	Newman, J. December 14, 1978	Ernest Lowenstein, Inc.	R63/7976, etc.	Export value	Appraised values less 15%	U.S. v. Ernest Lowenstein, Inc. (A.R.D. 325)	New York Glass stones, pendants, beads, etc.
R78/237	Newman, J. December 14, 1978	Ernest Lowenstein, Inc.	R63/10039, etc.	Export value	Appraised values less 15%	U.S. v. Ernest Lowenstein, Inc. (A.R.D. 325	New York Glass stones, pendants, beads, etc.
R78/238	Newman, J. December 14, 1978	Ernest Lowenstein, Inc.	R64/6206, etc.	Export value	Appraised values less 15%	U.S. v. Ernest Lowenstein, Inc. (A.R.D. 325)	New York Glass stones, pendants, beads, etc.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R78/239	Re, C. J. December 18, 1978	C. J. Tower & Sons of Buffalo, Inc.	R69/483	Cost of production	As set forth in decision and judgment in column designated "Total Cost of Production of Basic Automobiles" at amounts in Canadian currency, including value of U.S. components as appraised; value of optional equipment on each automobile in Canadian currency is the value found by appraising official as reflected on the invoices	U.S. v. C. J. Tower & Sons of Buffalo, Inc. (C.A.D. 1079)	Buffalo-Niagara Falls (Buffalo) Studebaker automobiles and optional equipment
R78/240	Re, C. J. December 18, 1978	C. J. Tower & Sons of Buffalo, Inc.	R69/487	Cost of production	As set forth in decision and judgment in column designated "Total Cost of Production of Basic Automobiles" at amounts in Canadian currency, including value of U.S. components as appraised; value of optional equipment on each automobile in Canadian currency is the value found by appraising official as reflected on the invoices	U.S. v. C. J. Tower & Sons of Buffalo, Inc. (C.A.D. 1079)	Buffalo-Niagara Falls (Buffalo) Studebaker automobiles and optional equipment

R78/241	Maletz, J. December 18, 1978	Cooper USA Div. of Burroughs Wellcome & Co. et al.	75-2-00346, etc.	United States value	U.S. selling prices per unit of tablets as determined by customs officer at time of appraisement, less allowance of 74.1% (7/1/73–12/31/73), 79.4% (1/1/74–6/30/74), and 79.6% (7/1/74–12/31/74) for general expenses and profit usually made in connection with sales in such market of imported merchandise of same class or kind as Scoloban; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; less allowance for customs duties payable on imported merchandise computed in accordance with method used by customs officer at time of appraisement	Agreed statement of facts	New York Veterinary pharmaceutical products known as Scoloban

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R78/242	Re, C. J. December 19, 1978	C. J. Tower & Sons of Buffalo, Inc.	R69/491	Cost of production	As set forth in decision and judgment in column designated "Total Cost of Production of Basic Automobiles" at amounts in Canadian currency, including value of U.S. components as appraised; value of optional equipment on each automobile in Canadian currency is the value found by appraising official as reflected on the invoices	U.S. v. C. J. Tower & Sons of Buffalo, Inc. (C.A.D. 1079)	Buffalo-Niagara Falls (Buffalo) Studebaker automobiles and optional equipment
R78/243	Re, C. J. December 21, 1978	C. J. Tower & Sons of Buffalo, Inc.	R69/486	Cost of production	As set forth in decision and judgment in column designated "Total Cost of Production of Basic Automobiles" at amounts in Canadian currency, including value of U.S. components as appraised; value of optional equipment on each automobile in Canadian currency is the value found by appraising official as reflected on the invoices	U.S. v. C. J. Tower & Sons of Buffalo, Inc. (C.A.D. 1079)	Buffalo-Niagara Falls (Buffalo) Studebaker automobiles and optional equipment

R78/244	Newman, J. December 21, 1978	Ernest Lowenstein, Inc.	R63/7956, etc.	Export value	Appraised values less 15%	U.S. v. Ernest Lowenstein, Inc. (A.R.D. 325)	New York Glass stones, pendants, beads, etc.
R78/245	Newman, J. December 21, 1978	Ernest Lowenstein, Inc.	R64/283, etc.	Export value	Appraised values less 15%	U.S. v. Ernest Lowenstein, Inc. (A.R.D. 325)	New York Glass stones, pendants, beads, etc.
R78/246	Newman, J. December 21, 1978	Ernest Lowenstein, Inc.	R65/14097, etc.	Export value	Appraised values less 15%	U.S. v. Ernest Lowenstein, Inc. (A.R.D. 325)	New York Glass stones, pendants, beads, etc.
R78/247	Newman, J. December 27, 1978	Ernest Lowenstein, Inc.	R63/7996, etc.	Export value	Invoiced unit prices less 2.845%	U.S. v. Ernest Lowenstein, Inc. (A.R.D. 325)	New York Glass stones, pendants, beads, etc.
R78/248	Newman, J. December 27, 1978	Ernest Lowenstein, Inc.	R63/8925, etc.	Export value	Appraised values less 15%	U.S. v. Ernest Lowenstein, Inc. (A.R.D. 325)	New York Glass stones, pendants, beads, etc.
R78/249	Newman, J. December 27, 1978	Yoshida International, Inc.	R70/1730, e/c.	Constructed value	Invoiced unit prices plus 8.5%, net, packed	Agreed statement of facts	New York Zippers and/or zipper parts, advisorily classified under either item 745.70, 745.72 or 745.74

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